Supreme Court, U.S.
FILED

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No.

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IN THE
SUPREME COURT of the UNITED STATES

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SHELLEY S. ROGERS,
Lieutenant Colonel, United States Air Force,
*Petitioner,*

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

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*On Petition for a Writ of Certiorari to the United States Court of Appeal for the Armed Forces*

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Whether Article 133, UCMJ, 10 U.S.C. § 933, alleging conduct unbecoming an officer and a gentleman, is void for vagueness because neither the military courts nor other military authority narrowed the broad reach of the statute to otherwise innocent conduct between officers?

II. Whether the charge under Article 133, UCMJ, 10 U.S.C. § 933, failed to state an offense because it did not identify specific acts that constituted the alleged conduct unbecoming an officer and gentleman?

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## PETITION FOR WRIT OF CERTIORARI

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Shelley S. Rogers, Lieutenant Colonel, United States Air Force, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces, *United States v. Rogers*, 54 M.J. 244 (C.A.A.F. 2000), is located in Appendix A at 1a-41a. The opinion of the Air Force Court of Criminal Appeals, *United States v. Rogers*, 50 M.J. 805 (AF Ct. Crim App 1999), is located in Appendix B at 42a-58a.

## JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on November 8, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(2).

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . ..

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation.

Article 133 of the Uniform Code of Military Justice (UCMJ) provides:

> Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and gentleman shall be punished as a court-martial may direct.

Article 133, UCMJ, 10 U.S.C. § 933.

## STATEMENT OF THE CASE

This case involves the constitutionally vague reaches of Article 133, UCMJ, 10 U.S.C. § 933, that prohibits military officers from engaging in conduct that is

"unbecoming an officer and gentleman." As this Court noted in *Parker v. Levy*, 417 U.S. 733 (1974), the literal language of Article 133, UCMJ, 10 U.S.C. § 933, has a very broad reach, governing all sorts of conduct by military officers. But, this Court upheld application of Article 133, UCMJ, 10 U.S.C. § 933, to certain types of improper conduct by officers, noting that military customs and construction of the offense by the military courts and other military authorities have narrowed the broad reach of the Article. Yet, this Court also agreed that there are "still areas within the general confines of the Article's language which have been left vague despite these narrowing constructions." *Parker* at 754. In the over twenty-five years since this Court decided *Parker*, this Court has not examined the vague reaches of Article 133, UCMJ, 10 U.S.C. § 933. This case presents the Court an opportunity to further clarify the constitutional limits on "conduct unbecoming an officer and gentlemen."

The issue in this case involves one area that remains constitutionally vague–the relationships between officers. Here, the Air Force charged the petitioner with conduct unbecoming an officer and gentleman by wrongfully and willfully developing an "unprofessional relationship of inappropriate familiarity" with a subordinate officer in his unit.[1] Neither Air Force custom, the military courts,

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[1] The charge stated:

> In that LIEUTENANT COLONEL SHELLEY S. ROGERS, United States Air Force, 90th Fighter Squadron, at or near Pordenone, Italy, did, between on or about 20 November 1995 and on or about 18 December 1995, wrongfully and willfully develop an unprofessional relationship of inappropriate familiarity with First Lieutenant Julie Clemm, a subordinate under his command, which conduct under the circumstances was unbecoming an officer

regulations, nor other military authority narrowed this offense.

As the then Air Force Court of Military Review[2] stated in *United States v. Kroop,* 34 M.J. 628, 634 (A.F.C.M.R. 1992), "the problems in defining or proving a custom [prohibiting excessive social contacts between officers] is readily apparent. Officers are expected to socialize with each other ... [and] [w]hat one person might regard as 'undue familiarity' or 'excessive social contacts' another person might regard as mere friendly socializing or demonstrations of concerns for one's subordinates."

## I. Facts

The petitioner was tried by General Court-Martial and found guilty in 1996 of conduct unbecoming an officer and gentleman in violation of Article 133, UCMJ, 10 U.S.C. § 933. He was sentenced to a reprimand and forfeiture of all pay and allowances for four months.[3]

The events that led to this court-martial occurred while the unit the petitioner commanded, an F-15 Fighter Squadron,[4] was deployed to Italy in the fall of 1995 to fly combat missions over Bosnia. The petitioner's record of outstanding achievement was undisputed, having been selected for early promotion three times in his career, including his below-the-zone promotion to colonel during

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and gentleman.

[2] The Air Force Court of Military Review (A.F.C.M.R.) has been renamed as the Air Force Court of Criminal Appeals (A.F.C.C.A.).

[3] The petitioner was also charged with conduct prejudicial to good order and discipline under Article 134, UCMJ, 10 U.S.C. § 934, but that charge is not implicated in this petition.

[4] The unit Deployed to Italy with approximately 200 personnel, both officer (30) and enlisted (170).

the deployment in December 1995.

It was during this deployment that the petitioner was accused of developing an unprofessional relationship of inappropriate familiarity with First Lieutenant (1Lt) Julie Clemm, the squadron intelligence officer. 1Lt Clemm was new to the squadron and joined the deployment to Italy in mid-November 1995.

The claims of misconduct against the petitioner were primarily raised by Major (Maj) Michael A. Cloutier, a weapons systems officer (navigator) and an Assistant Director of Operations for the squadron, and a small group of his officer friends within the squadron, whom Maj Cloutier called, "the boys." Maj Cloutier was second in command of the squadron during the deployment. The petitioner had recently counseled or reprimanded all of these officers for inappropriate conduct during the deployment.

The charge did not specify any acts or conduct that allegedly constituted the conduct unbecoming an officer and gentleman, but a bill of particulars included: allegations that the petitioner had frequent off-duty contacts with 1Lt Clemm--including riding in a car rented by the squadron for transportation during the deployment; allegations that petitioner behaved inappropriately toward 1Lt Clemm at a squadron Thanksgiving party and put his arm around her while standing around a bonfire with other squadron personnel that evening; and testimony from several officers concerning their "perception" of the petitioner's behavior.[5]

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[5] The original charges also included a charge of adultery against the petitioner, but the government dropped that charge before trial, as well as several others, because they had *no admissible evidence* to support the allegation. While investigating the adultery charge, the government compelled 1Lt Clemm to cooperate under a grant of immunity. She

A copy of the bill of particulars is printed at Appendix C.

## II. Proceedings Below

At trial, the petitioner challenged the charge because it failed to plead any custom or regulation that would narrow the broad reach of Article 133 to otherwise innocent conduct between officers. He also challenged the charge because it failed to allege any acts upon which the offense was based. Finally, the petitioner vigorously contested the evidence presented at trial. He challenged the credibility of the key government witnesses; he testified and denied any inappropriate behavior or relationship with 1Lt Clemm; and he presented the testimony of many officers and enlisted personnel from the squadron who stated that they saw no inappropriate behavior between their commander and 1Lt Clemm.[6] 1Lt Clemm also testified at trial and denied any inappropriate behavior or relationship between the two.

On Appeal to the Air Force Court of Criminal Appeals (A.F.C.C.A.), the petitioner challenged the charge of conduct unbecoming an officer and gentleman because it was unconstitutionally vague and failed to state an offense. He also challenged the sufficiency of the evidence supporting the charge. The Air Force Court rejected this

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stated under oath that she *had not committed adultery*; she also *denied engaging in any other inappropriate conduct* with the petitioner. She repeated this testimony at trial.

[6] The following individuals testified that they saw no inappropriate behavior between the petitioner and 1Lt Clemm: Capt Lovrak, MSgt Sanchez, Capt Burg, Capt Reesman, Capt Jaasma, Capt Bennett, SMSgt Adams, MSgt Keiholz, MSgt Kowski, Capt Hume, SSgt Warner, TSgt Conners, SrA Gaultney, TSgt Deview, TSgt Wood, TSgt Myers, TSgt Deardorff.

appeal holding that the petitioner had adequate notice regarding the charge that he committed conduct unbecoming an officer and gentleman by developing an unprofessional relationship of inappropriate familiarity with 1Lt Clemm. *United States v. Rogers*, 50 M.J. 805 (AF Ct. Crim App 1999). The Air Force Court also concluded that the charge stated a course of conduct offense and did not need to specify any acts of the alleged unprofessional relationship of inappropriate familiarity. *Id.* at 809. The A.F.C.C.A. also rejected the petitioner's challenges based on the sufficiency of the evidence presented at trial. *Id.* at 812.

Petitioner also brought these claims on his appeal before the United States Court of Appeals for the Armed Forces[7] (C.A.A.F.). *United States v. Rogers*, 54 M.J. 244 (C.A.A.F. 2000) The C.A.A.F. rejected petitioner's claims that the charge was unconstitutionally vague and did not allege any wrongful acts. The Court also rejected his challenge to the sufficiency of the evidence by a vote of four to one.

Judge Effron dissented, finding the evidence legally insufficient to support the charge. He stated, "... [t]he evidence reflected the *speculation* of others as to the possibility of an inappropriate relationship, but did not provide a legally sufficient basis upon which a reasonable factfinder could have concluded, beyond a reasonable doubt, that [petitioner's] conduct with 1Lt Clemm crossed the line from permissible interaction to an illegal unprofessional relationship of inappropriate familiarly." *Rogers*, 54 M.J. at 262 (Effron, J. concurring in part and dissenting in part) (emphasis added). While Judge Effron

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[7] This Court was formerly named the United States Court of Military Appeals (C.M.A.).

concluded that there is a line between permissible and impermissible interaction between officers, his finding that the petitioner *did not cross that line* while others, relying on the same conduct, concluded that it *did cross the line* between permissible and impermissible conduct between officers demonstrates just how difficult it is to ascertain what conduct between officers is permissible and what conduct is not.

In its majority opinion, the C.A.A.F. acknowledged, "there will be many gradations of relationships and associations between servicemembers that will not put the parties fairly on notice that the conduct might be inappropriate." *Rogers*, 54 M.J. at 257. The C.A.A.F. cited a nonpunitive[8] Air Force regulation that suggested, "*senior members should not date* or be personally obligated or indebted to junior members." *Id.* (emphasis original). The Court then stated that it "decline[d] to attempt to walk a line between 'dating' and the evidence adduced at [petitioner's] court-martial." *Id.* at 257, n 25. The C.A.A.F. quoted this Court, noting that there is certain conduct to which Article 133, UCMJ, 10 USC § 933, "clearly applies without vagueness or imprecision." The C.A.A.F. then simply concluded, *without analysis of the facts*, that "under the circumstances of this case, we are satisfied that [petitioner's] conduct falls into the latter category. Any officer would be on notice that this type of

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[8] A *punitive* regulation is a regulation that is intended to regulate the conduct of individual servicemembers, and the direct application of sanctions for violations of the regulation must be self-evident. A *nonpunitive* regulation is one that supplies only general guidelines or advice for conducting military functions and may not be enforceable under Article 92(1), UCMJ, 10 U.S.C. § 892 (criminal offense of violating a lawful general regulation). *United States v. Shavrnoch*, 49 M.J. 334, 336 (C.A.A.F. 1998).

behavior was punishable." *Id.* at 257.

## REASONS FOR GRANTING THE PETITION

### I. Article 133, UCMJ, 10 U.S.C. § 933, alleging conduct unbecoming an officer and a gentleman, is void for vagueness because neither the military courts nor other military authority narrowed the broad reach of the statute to otherwise innocent conduct between officers.

The petitioner, so far as can be ascertained by a review of reported military opinions, is the only officer that has been punished by Court Martial for conduct unbecoming an officer and gentleman for an "unprofessional relationship of inappropriate familiarity" with a subordinate officer when that alleged improper relationship did not involve allegations of violations of other UCMJ provisions, such as adultery.

This case involves a fundamental due process question of when an allegation must be struck down because it is unconstitutionally vague. The "void for vagueness" doctrine "incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.'" *Parker v. Levy,* 417 U.S. 733, 753 (1974)(citations omitted).

Article 133, UCMJ, 10 U.S.C. § 933, prohibits officers from engaging in "conduct unbecoming an officer and gentleman." In *Parker v. Levy*, 417 U.S. 733 (1974), the principal case construing charges under Article 133, 10 U.S.C. § 933, this Court noted that the "literal language" of Article 133, 10 U.S.C. § 933, "had a very broad reach." *Id.* at 752-53. The Court observed that the then Court of Military Appeals "has narrowed the very broad reach of

the literal language" of Article 133, 10 U.S.C. § 933, and at the same time the C.A.A.F. "has supplied considerable specificity by way of examples of the conduct which they cover." *Id.* at 754. However, even with this narrowing construction, the Court acknowledged that there may still be "sizable areas of uncertainty as to the coverage of the articles." *Id.* This is such a case.

The *Parker* Court recognized "the factors differentiating military society from civilian society," and described the proper standard of review for a vagueness challenge to Article 133, UCMJ, 10 U.S.C. § 933:

> Void for vagueness simply means that criminal responsibility should not attach where *one could not reasonably understand that his contemplated conduct is proscribed.* In determining the sufficiency of the notice a statute must of necessity be examined *in light of the conduct* with which a defendant is charged.

417 U.S. at 756-57, (emphasis added) *quoting United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33, (1963) (citations omitted). *See also United States v. Dear*, 40 M.J. 196 (C.M.A. 1994)(upholding a charge of maltreatment of a subordinate under Article 93, UCMJ, 10 U.S.C. § 893); and *United States v. Norvell*, 26 M.J. 477, 480 (C.M.A. 1988)(upholding a charge of conduct unbecoming an officer and gentleman under Article 133, UCMJ, 10 U.S.C. § 933, when officer catheterized herself to conceal use of marijuana and explained how to avoid such detection to an enlisted person). The C.A.A.F. has applied this void for vagueness standard holding that "[t]he primary obstacle to prosecuting a servicemember under the general article is that the servicemember must be on 'fair notice' that his conduct was punishable under the Uniform Code."

*United States v. Bivins*, 49 M.J. 328 (C.A.A.F. 1998).

In *Parker*, this Court upheld charges under Article 133 and Article 134, UCMJ, 10 U.S.C. § 933 and § 934, that charged Captain Levy, an Army physician, with conduct unbecoming an officer and gentleman and conduct prejudicial to good order and discipline. The charges stemmed from Captain Levy's statements to enlisted personnel denouncing the United States' participation in the Viet Nam War and urging the enlisted personnel to refuse to go to or fight in Viet Nam.

This Court held that Captain Levy had fair notice that his conduct violated the Articles and that they were not void for vagueness as applied to him. The Court found the notice in two sources: prior decisions by the then Court of Military Appeals and in language in the Manual for Courts-Martial. Among the Court of Military Appeals decisions the Court cited was *United States v. Priest*, 21 U.S.C.M.A. 564, 45 C.M.R. 338 (1972), applying Article 134, UCMJ, 10 U.S.C. § 934, to calls for active opposition to the military policy of the United States. Additional notice was found in the Manual for Courts-Martial. Under Article 134, UCMJ, 10 U.S.C. § 934, the Manual stated, "certain disloyal statements by military personnel" may be punished and noted as an example "utterances designed to promote disloyalty or disaffection among troops, as praising the enemy, attacking the war aims of the United States, or denouncing our form of government." *Parker* at 753.

The petitioner's case can be distinguished from *Parker*. Unlike *Parker*, there was no prior opinion by the military courts, no examples from the Manual for Courts-Martial, and no relevant custom of the service, regulation, or other military authority to give the petitioner adequate notice

that otherwise innocent conduct between he and his subordinate officer would fall within the reach of Article 133, UCMJ, 10 U.S.C. § 933. To the contrary, the leading opinion from the military appellate courts specifically held that an officer *could not* be held criminally accountable under Article 133, UCMJ, 10 U.S.C. § 933, for excessive social contacts with a subordinate officer.

In *United States v. Kroop*, the Air Force similarly court-martialed an officer for conduct unbecoming an officer and gentleman for "excessive social contacts"[9] with a subordinate officer. 34 M.J. 628 (A.F.C.M.R. 1992), 38 M.J. 470 (C.M.A. 1993). In *Kroop*, both military appellate courts *set aside* Lieutenant Colonel Kroop's conviction based on the "excessive social contacts," with a subordinate officer holding, in accordance with *Parker*, that such a charge was too vague to state an offense in the absence of a custom of the service or regulation that prohibited such conduct. *Kroop*, 34 M.J. at 634; 38 M.J. at 473. Moreover, because *Kroop* involved a *guilty plea*, the appellate rulings were made while employing a strict standard of review used to test specifications in guilty plea cases. *See Kroop*, 38 M.J. at 474 (Gierke, J. dissenting). *See also United States v. French*, 31 M.J. 57, 59 (C.M.A 1990) (when a specification is challenged at trial, it is examined much more critically than if challenged for the first time on appeal). This strict standard of review was not applicable to the petitioner's case because he challenged the charge on this principle at the outset of his trial and did not plead guilty.

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[9] *Kroop* included allegations of adultery. That portion of the charge was upheld under Article 134, UCMJ, 10 U.S.C. §934, conduct to the prejudice of good order and discipline in the armed forces, because, like the disloyal statements in *Parker*, adultery is specifically enumerated as an example under Article 134, UCMJ, 10 U.S.C. §934, thus giving adequate notice to servicemembers. *Kroop*, 34 M.J. at 635.

In the absence of a custom or regulation further defining proscribed relationships between officers, the petitioner could not understand what conduct is prohibited. *See Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 525 (1994) (void for vagueness requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can under what conduct is prohibited). *Accord, Staples v. United States*, 511 U.S. 600, 605 (1994) *citing Morissette v. United States*, 342 U.S. 246, 250 (1952) (before an injury can amount to a crime, individual must be able to "choose between good and evil"). This is particularly true because the offense involved an "unprofessional relationship of inappropriate familiarity" between two officers. Officers are expected to socialize with on another. Indeed, the record is replete with examples of socializing between the petitioner and all of his subordinate officers during the entire deployment.

Much of the evidence in this case focused on an evening in November 1995 when the petitioner's squadron had a Thanksgiving celebration. After the group's meal, the celebration moved to the beach where they made a bonfire. Here, the petitioner was alleged to have put his arm around 1Lt Clemm for a brief period of time.[10] While *repeated, intentional* physical contact of this nature for *extended periods of time* might be evidence of an unprofessional relationship, this brief physical contact, in the setting that it occurred, cannot be the basis of a criminal charge. To convict on such conduct would subject nearly every officer to criminal sanctions for otherwise innocent physical contact with their subordinate officers. This would include a fond greeting, a celebratory

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[10] The petitioner vigorously challenged the evidence surrounding this incident at trial. Both he and 1Lt Clemm, as well as others present, testified that it did not occur.

embrace, a slap on the back or hand on the shoulder for encouragement, or a simple goodbye hug. In fact, the record shows us that the petitioner's number two officer in command during the deployment, Maj Cloutier, posed for a photo *with his arm around 1Lt Clemm* this very same evening that the petitioner is alleged to have improperly had his arm around 1Lt Clemm. Further, 1Lt Clemm gave Maj Cloutier a birthday hug, and Maj Cloutier indicated he often hugged women as a greeting, yet he was not subject to criminal allegations of inappropriate conduct.

In addition to the events of the squadron Thanksgiving party, the Air Force Court noted that the petitioner and 1Lt Clemm went to the gym and ate at restaurants together. *Rogers*, 50 M.J. at 811. Yet, the Court did not articulate how these facts are evidence of an unprofessional relationship. Indeed, just two pages earlier in their opinion, the Air Force Court stated, "such acts could be perfectly legal." *Id.* at 809. In fact, the evidence at trial indicated that *all of the officers in the squadron* traveled together in cars, worked out at the gym together, and went out to dinner. There simply is nothing improper about this conduct. Indeed, such conduct is quite common for a deployed unit where there are limited transportation resources and group activities are widely encouraged.

The then Air Force Court of Military Review touched on this problem in *Kroop*. The Court said:

> The problem in defining or proving such a custom is readily apparent. *Officers are expected to socialize with each other.* Officers may date other officers, treat each other with various degrees of intimacy, and marry each other. *What one person might regard as "undue familiarity" or "excessive social contacts" another person might regard as mere friendly*

*socializing or demonstrations of concern for one's subordinates.*

34 M.J. at 634 (emphasis added).

Moreover, unlike the officer/enlisted fraternization offense which is specifically defined in the Manual for Courts-Martial (1995), Part IV, paragraph 83, and which has been construed in numerous appellate decisions, no such legal history can be found defining officer/officer unprofessional relationships that are considered criminal. Furthermore, violation of a custom of the service is an essential element of fraternization offenses prosecuted under Article 134, UCMJ, 10 U.S.C. § 934. No comparable element was included under the Article 133, UCMJ, 10 U.S.C. § 933, offense that the petitioner faced.

This Court has explained why vague laws are Constitutionally impermissible:

> Vague laws offend several important values. First because we assume that man is free to steer between lawful and unlawful conduct, *we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.* Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. *A vague law impermissibly delegates basic policy matters* to policemen, judges, and juries *for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discrimination application.*

*Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (emphasis added). *See also City of Chicago v. Morales*, 527

U.S. 41, 63-64 (1999)(Chicago's Gang Congregation Ordinance stuck down as unconstitutionally vague in failing to give notice and providing absolute discretion in police officers to determine what activities constituted prohibited loitering); *Parker*, 417 U.S. at 752.

The facts of petitioner's case demonstrate both evils of such a vague charge as an "unprofessional relationship of inappropriate familiarity" between officers. Not only was the petitioner not provided adequate notice of what type of social contacts between officers would subject him to a *criminal* allegation, the "unprofessional relationship of inappropriate familiarity" charge was arbitrarily and discriminatorily applied against him when the record clearly demonstrates others, including his prime accuser, committed acts which were virtually identical to the allegations against the petitioner.[11] As noted above, the very same evening that the petitioner allegedly put his arm around 1Lt Clemm at the bonfire–a charge both he and 1Lt Clemm denied under oath–Maj Cloutier was photographed with *his arm around 1Lt Clemm.* Further, in his testimony, Maj Cloutier admitted that he often hugged women, including 1Lt Clemm, yet he was not similarly charged

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[11] The petitioner's case preceded the now infamous "Kelly Flinn" case involving allegations of adultery, fraternization, and false official statements against the Air Force's first female B-52 pilot. While the alleged improper conduct was different in the Flinn matter, the Air Force was widely criticized for *disparate application* of adultery charges against women. An official Air Force memorandum released on 16 July 1997, by the Secretary of the Air Force and Chief of Staff, *after the trial in this case* and after the Flinn matter, encouraged commanders to draw on a wide range of responses to allegations of fraternization and unprofessional relationships. The memorandum noted that court-martial was appropriate only "in the most aggravated cases." *See United States v. Clack*, 47 M.J. 813 (AF Ct. Crim App 1998).

with developing an "unprofessional relationship of inappropriate familiarity."

The A.F.C.C.A. and C.A.A.F. claimed that an Air Force regulation defined the term "unprofessional relationship" with adequate specificity (50 M.J. at 808; 54 M.J. 256-57) to overcome the petitioner's challenge to the charge as vague. However, the Air Force regulation, Air Force Instruction (AFI) 36-2909 (App. D), did not adequately define the term "unprofessional relationship." This is illustrated by the fact that this regulation was revised on 1 May 1996, between the time of the alleged offense and the petitioner's trial. The revised regulation "provided *additional guidance on activities and situations that lead to or constitute unprofessional relationships*," and "provided expanded guidance on administrative actions which may be initiated as a result of unprofessional relationships." App. E (emphasis added). Even the May 1996 regulation has undergone significant revision as the military services have grappled with clearly defining inappropriate social contacts in the wake of media attention.[12]

The current version of the regulation was published on 1 May 1999, "substantially revis[ing]" the May 1996 version

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[12] On 10 June 1997, Secretary of Defense William Cohen announced three initiatives "to ensure policies governing good order and discipline are *clear* and fair." One of these specifically set out "*to review the clarity of existing guidance* on adultery under the UCMJ." Secretary Cohen's remarks indicated, "*recent perceptions that our system is inconsistent damage the morale of our troops.*" In referring the matter to the General Counsel for review, Secretary Cohen noted, "recent events suggest *the need to review the clarity of existing guidance* related to adultery under the Uniform Code of Military Justice." This lack of clarity is all the more palpable when the charge of an "unprofessional relationship of inappropriate familiarity," as in Lt Col Rogers's case, does not involve allegations of sexual misconduct, including adultery.

that it superceded. This version specifically includes a requirement that all personnel be trained on this policy and receive annual briefings. AFI 36-2909, paragraph 9. App. F. In fact, the official training program for this regulation includes the following note, "[e]xperience has shown that most violations of the Air Force policy on Professional Relationships stem from inexperience or unfamiliarity with the policy and can be easily and quickly corrected through education." App. F.

Article 133, UCMJ, 10 U.S.C. § 933, as applied to the petitioner in this case is void for vagueness and must be dismissed. The petitioner's fundamental right to due process was violated when the government charged him with and convicted him of conduct unbecoming an officer and gentleman for maintaining an "unprofessional relationship of inappropriate familiarity" with his subordinate officer, 1Lt Julie Clemm. "Citizens in uniform may not be stripped of their basic rights simply because they have doffed civilian clothes." *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (*quoting* Warren, The Bill of Rights and the Military, 37 N.Y.U.L.Rev. 181, 188 (1962)). The petitioner must not be stripped of his most basic right of due process.

**II. The charge under Article 133, UCMJ, 10 U.S.C. § 933, failed to state an offense because it did not identify specific acts that constituted the alleged conduct unbecoming an officer and gentleman.**

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation." *See, e.g., In re Oliver*, 333 U.S. 257, 273 (1948) (right to reasonable notice of charges); *Powell v. Alabama*, 287 U.S. 45, 68 (1932) (due process requires notice of essential

elements). In this case in addition to its vagueness as raised above, the charge under Article 133, UCMJ, 10 U.S.C. § 933, also did not identify any acts constituting the alleged conduct unbecoming an officer and gentleman. Although the charge alleged the petitioner developed an "unprofessional relationship of inappropriate familiarity" with a subordinate officer, there is no way, given the current state of the record of trial, to determine what acts the court members found that petitioner committed beyond a reasonable doubt that amounted to the "unprofessional relationship of inappropriate familiarity."

In *Russell v. United States*, 369 U.S. 749 (1962), this Court stated, "basic principles of fundamental fairness retain their full vitality under modern concepts of pleading." 369 U.S. at 765-66. In reversing six separate convictions based on motions to quash indictments brought under 2 U.S.C. § 192, this Court expressed the recognized notion that an indictment cannot stand that fails to identify the relevant "core of criminality" and where "guilt depends so crucially upon a specific identification of fact." 369 U.S. at 764. The Court added:

> A cryptic form of indictment in cases of this kind requires the defendant to go to trial with the chief issue undefined. *It enables his conviction to rest on one point and the affirmance of the conviction to rest on another.* It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise and conjecture.

369 U.S. at 766 (emphasis added). *See also United States v. Murphy*, 762 F.2d 1151 (1st Cir. 1985)(indictment for threatening a witness in an official proceeding under 18 U.S.C. § 1512 was defective because it did not identify the *particular* proceeding and therefore did not adequately

apprise defendants of charges against them).

*Russell* also made it clear that providing a bill of particulars (Appellate Exhibit 10 in this case) is inadequate to remedy this problem, by stating, "it is a settled rule that a bill of particulars cannot save an invalid indictment." 369 U.S. at 770, *Murphy* at 1154.

This Court described the problem with a defective charge that leaves the core of criminality undefined in a recent case while construing the "continuing criminal enterprise" violation under 21 U.S.C. § 848. *Richardson v. United States*, 526 U.S. 813 (1999). In *Richardson*, the Court noted that the government, by not specifically alleging *which acts* violated the law and constituted a continuing criminal enterprise,

> *permitt[ed] a jury to avoid discussion of the specific factual details of each violation [and] will cover-up wide disagreement among the jurors about just what the defendant did, or did not, do.* The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, *unless required to focus upon specific factual detail, will fail to do so,* simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.

*Id.* at 819 (emphasis added).

The charge against the petitioner alleging conduct unbecoming an officer and gentleman by developing an "unprofessional relationship of inappropriate familiarity" highlights the need for the government to identify the alleged improper acts. Both military appellate courts rejected this notion. The Air Force Court described this as a "course of conduct offense" in deciding that it was not

necessary for the prosecution to allege or for the members to vote on and find specific acts of this so-called "unprofessional relationship of inappropriate familiarity." *Rogers*, 50 M.J. at 809. The C.A.A.F. stated that the "acts" did not constitute the "unprofessional relationship of inappropriate familiarity," they evidenced it. *Rogers*, 54 M.J. at 257. Under the rationale of both courts, the jurors were not required to discuss any specific facts while deliberating on this charge.

Here, both considerations noted in *Richardson* are present. First, the failure to allege any specific acts in the charge improperly allowed the jurors to agree on the charge even if they widely disagreed about what the petitioner did or did not do–facts that were vigorously contested at trial. What did the petitioner do–by way of *acts*–in his relationship with his subordinate officer–that amounted to "conduct unbecoming an officer and gentleman?" Did going to the gym one time and playing racquetball with her qualify? Did riding to or from the wing operations center in a car with her qualify? Did talking to her on the telephone twice late at night qualify? Did briefly putting his arm around her at a bonfire qualify? Did any of these events occur beyond a reasonable doubt? What combination of events must have existed before an "unprofessional relationship of inappropriate" was achieved?

Because no acts were pled in the charge against the petitioner, there was no objective standard by which these questions could be factually resolved. To the extent the court members answered these questions, there is no record upon which to test their findings against the evidence.

*Richardson* also articulated a second consideration that is present when the government does not specifically allege

which acts constituted "conduct unbecoming an officer and gentleman." Without such acts identified in the charge, the jurors are left to conclude from testimony, "where there is smoke there must be fire." *Richardson* at 819.

The petitioner's record is full of such "smoke" as the subordinate officers who testified against him were all allowed to testify that they *perceived* that something improper was going on. The following question, asked by a court member,[13] demonstrates that the case against the petitioner was based on perception:

> On numerous occasions during Maj Cloutier's testimony, he referred to "incidents" and the "situation". Much of his testimony seems to be based on crewmember assumptions and perceptions. Question: Can Maj Cloutier provide some specific facts concerning "incidents" or the "situation" which support the allegation of "unprofessional relationship of inappropriate familiarity?

Appellate Exhibit XXIX (emphasis original).

Indeed, both lower appellate courts cited this *perception* as significant in finding that the petitioner committed the offense. *Rogers*, 50 M.J. at 811, 54 M.J. at 249. Yet, many of these individuals had no actual knowledge of any improper actions by the petitioner.

On this item, the Air Force Court noted,

> Several officers in the squadron *believed* the accused and 1Lt Clemm spent an inordinate amount of time

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[13] In the military, a court member is detailed by the convening authority to serve on a panel as a juror for the court martial. The court members determine whether the accused is guilty and, if necessary, determine a proper sentence. R.C.M. 502(a).

> together. They *seemed* to travel back and forth between the hotel and the squadron together on a regular basis. They went to the gym and ate at restaurants together.

50 M.J. at 811 (emphasis added). Here, the Air Force Court did not find as fact that the petitioner and 1Lt Clemm spent an inordinate amount of time together, but referred to the officers' *"belief"* and their testimony that the petitioner and 1Lt Clemm *"seemed"* to travel back and forth between the hotel and the squadron together on a regular basis. Later in the opinion, the Air Force Court noted, "[s]everal subordinate officers warned the accused of the *perception* that he was carrying on an affair with Lt Clemm. The accused took no action to change his behavior or alleviate the concerns of his subordinates." *Rogers*, 50 M.J. at 812. The witnesses' subjective belief or perceptions, without factual evidence to support their opinions, cannot be the basis of the petitioner's *criminal* conviction. *See United States v. Hecker*, 42 M.J. 640, 644 (AF Ct. Crim App 1995)(an individual cannot be found *criminally* guilty on an "appearance" of impropriety).

Nothing illustrates this better than Judge Effron's dissent. He noted that the evidence "reflected the *speculation of others* as to the possibility of an inappropriate relationship, but did not provide a legally sufficient basis upon which a reasonable factfinder could have concluded, beyond a reasonable doubt, that appellant's conduct crossed the line from permissible interaction to an illegal unprofessional relationship of inappropriate familiarity." *Rogers*, 54 M.J. at 262 (Effron, J. dissenting) (emphasis added).

Further, the Air Force Court noted that the petitioner and 1Lt Clemm went to the gym and ate at restaurants

together. However, the Court did not articulate how these facts are evidence of an unprofessional relationship. Indeed, just two pages earlier in the opinion, the Air Force Court stated, "such acts could be perfectly legal." *Rogers*, 50 M.J. at 809.

In fact, a review of the entire record on the allegation that the frequency of contacts between the petitioner and 1Lt Clemm somehow supported the Article 133, UCMJ, 10 U.S.C. § 933, conduct unbecoming charge demonstrates that, although several squadron members subjectively believed that the frequency was inappropriate, the prosecution *did not present any evidence* to support their subjective beliefs. Instead, because the charge did not include specific factual allegations, it allowed the government to rely on the witnesses' subjective beliefs. One witness's testimony, reproduced below, vividly demonstrates the lack of *actual evidence* against the petitioner:

> A: I told [Lt Col Rogers] that I, in my opinion, his relationship with Lieutenant Clemm was inappropriate, and I just wanted to let him know that I thought it was inappropriate.
> Q: What had you seen yourself, with regard to that relationship, that caused you to bring this up, other than what others may have told you, what did you see personally?
> A: Well, a couple of times, driving in his car together, just the two of them alone. His attitude towards the rest of us in discussing her, seemed to be more defensive in nature than I would have expected. *It was just a general impression I had.*
> Q: What about other than riding in his car, were there other places that you had seen them?
> A: *I saw them at the Wing Operations Center one*

*time together.*
Q: Is that off duty?
A: *No, that was on duty.*
Q: Okay. What about off duty contacts? Did you ever see them in the gym together?
A: *I saw them come back from the gym together. I did not see them at the gym together.*

Trial Record, Vol. IV, p. 493 (emphasis added).

The charge in this case failed to sufficiently apprise the petitioner of the nature and cause of the accusation against him. While the charge contained a general description of the offense, it was not accompanied with a statement of the facts and circumstances to inform the petitioner of the offense he was charged with. *Russell*, 369 U.S. at 765. Not only did the charge fail to adequately inform the petitioner, it failed an important corollary purpose in that it did not "inform the court of the facts alleged, so that [the court] may decided whether they are sufficient in law to support a conviction, if one should be had." *Id.* at 768. As a consequence, not only was the petitioner deprived of defending against the nature and cause of the accusation against him at trial, he has been deprived of meaningful appellate review as the appellate courts have been unable to "bring an enlightened judgment" to the task of evaluating the sufficiency of the evidence against him. *Id.* at 769.

## CONCLUSION

The charge of conduct unbecoming an officer and gentleman in this case cannot be upheld. Article 133, UCMJ, 10 U.S.C. § 933, is unconstitutionally vague because it has broad reach to otherwise innocent conduct between officers and has not been sufficiently narrowed by the military courts or other military authority. This broad reach causes indiscriminate application of Article 133,

UCMJ, 10 U.S.C. §933, undermining belief that the military justice system will be applied in a fair and evenhanded manner. Moreover, the charge was insufficient because it did not give reasonable notice of the allegation against the petitioner. Consequently, without such specificity, the jurors possessed no clear factual basis upon which to reach their finding. Finally, appellate courts, including this Court, are unable to perform reasoned appellate review given the charge and the evidence in the record of trial.

Petitioner respectfully requests that this Honorable Court grant the petition for a writ of certiorari to the United States Court of Appeals for the Armed Forces.

Respectfully submitted,

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February 2001

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Supreme Court, U.S.
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IN THE
# SUPREME COURT of the UNITED STATES

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SHELLEY S. ROGERS,
Lieutenant Colonel, United States Air Force,
*Petitioner,*

*v.*

UNITED STATES OF AMERICA,
*Respondent.*

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***On Petition for a Writ of Certiorari to the United States Court of Appeal for the Armed Forces***

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## APPENDIX

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**February 2001**

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## Appendix A

UNITED STATES, *Appellee,*

v.

Shelley S. ROGERS, Lieutenant Colonel,
U.S. Air Force, *Appellant*

No. 99-0838

Crim. App. No. 32711

United States Court of Appeals for the Armed Forces

Argued April 5, 2000
Decided November 8, 2000

COX, S.J., delivered the opinion of the Court, in which CRAWFORD, C.J., SULLIVAN and GIERKE, JJ., joined. SULLIVAN, J., filed a concurring opinion. EFFRON, J., filed an opinion concurring in part and dissenting in part.

Counsel

For Appellant: *Major Robin S. Wink,* USAFR (argued); *Frank J. Spinner* (on brief).

For Appellee: *Major Jennifer R. Rider,* (argued); *Colonel Anthony P. Dattilo,* and *Lieutenant Colonel Ronald A. Rodgers* (on brief).

Military Judge: James E. Heupel

**Senior Judge COX delivered the opinion of the Court.**

Appellant was the commander of the 90th Fighter Squadron, which deployed from Elmendorf Air Force Base (AFB), Alaska, to Aviano Air Base (AB), Italy. He stands convicted of disorderly conduct on divers occasions and conduct unbecoming an officer by "wrongfully and willfully develop[ing] an unprofessional relationship of inappropriate

familiarity" with First Lieutenant (1Lt) Julie Clemm, a subordinate member of his command.[1] Both offenses were alleged to have occurred at or near Pordenone, Italy, in November and December of 1995.

We granted review of these issues:

I. WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY UPHOLDING CHARGE II AND THE SPECIFICATION THEREUNDER (ALLEGING AN UNPROFESSIONAL RELATIONSHIP UNDER ARTICLE 133) BECAUSE THE SPECIFICATION WAS UNCONSTITUTIONALLY VAGUE WHEN IT FAILED TO IDENTIFY A RELEVANT CUSTOM OR REGULATION WHICH PROHIBITS RELATIONSHIPS BETWEEN OFFICERS.

II. WHETHER THE AIR FORCE COURT OF CRIMINAL APPEALS ERRED BY UPHOLDING CHARGE II AND THE SPECIFICATION THEREUNDER (ALLEGING AN UNPROFESSIONAL RELATIONSHIP UNDER

---

[1] Violations of Articles 133 and 134, Uniform Code of Military Justice, 10 USC §§ 933 and 934. The disorderly conduct charge (Art. 134) was unrelated to the conduct unbecoming charge (Art. 133), and there are no issues before us concerning disorderly conduct. The evidence adduced on that charge revealed

> that on more than one occasion, in the city streets of Pordenone, Italy, the accused walked on the cars of others that were parked along the street. On each of these occasions he did so in the presence of subordinates under his command. On the last occasion, which occurred after an impromptu promotion party, the accused had to be restrained by an officer under his command who observed damage to the vehicles.

United States v. Rogers, 50 MJ 805, 813 (A.F.Ct.Crim.App. 1999). As approved by the convening authority and affirmed by the Court of Criminal Appeals, appellant's sentence is a reprimand and forfeiture of $2,789 per month for 4 months.

ARTICLE 133) BECAUSE THE SPECIFICATION FAILED TO IDENTIFY SPECIFIC ACTS WHICH CONSTITUTED AN UNPROFESSIONAL RELATIONSHIP AND AS SUCH FAILED TO STATE AN OFFENSE.

III. WHETHER THE EVIDENCE IS LEGALLY INSUFFICIENT TO FIND APPELLANT GUILTY OF CHARGE II, WILLFULLY DEVELOPING AN UNPROFESSIONAL RELATIONSHIP WITH 1LT CLEMM.

Being a court with only legal review authority, Art. 67(c), Uniform Code of Military Justice, 10 USC § 867(c), we review facts in the light most favorable to the prevailing party below. It is not our function to reweigh evidence and determine guilt or innocence anew. In the case of legal sufficiency of the evidence, our standard of review is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." United States v. Turner, 25 MJ 324 (CMA 1987); see Jackson v. Virginia, 443 U.S. 307, 319 (1979). Further, "[i]n resolving legal-sufficiency questions, . . . [we are] bound to draw every reasonable inference from the evidence of record in favor of the prosecution." United States v. Blocker, 32 MJ 281, 284 (CMA 1991).

The Evidence

The 90th Fighter Squadron deployed to Italy on October 4, 1995, with eight F-15E's and twelve 2-man crews. The mission was "to maintain around the clock presence over [the] top of Bosnia." There had been "multiple air strikes" on Bosnia the week prior to the 90th's arrival. The 90th was flying combat missions over Bosnia. Generally, they worked 6 days on and 2 days off. As the off-days rarely coincided with calendar weekends, the off-days were known as "virtual weekends," comprised of "virtual Saturdays" and "virtual Sundays."

Appellant first met 1Lt Clemm at an Officers' Club in Korea, in April or May 1995, while the 90th was in Korea on temporary duty. She was interested in a position in his squadron, and he approved her application. 1Lt Clemm arrived at Elmendorf AFB about the time the squadron was deploying to Italy. She joined the squadron in Italy on November 18, 1995, about a month and a half into the operation.

Captain (Cpt) Laurie Lovrak also met 1Lt Clemm in Korea in about May 1995. Cpt Lovrak became 1Lt Clemm's sponsor, in effect, as she processed into the squadron, and Cpt Lovrak preceeded 1Lt Clemm to Italy.

In Italy, Cpt Lovrak briefed 1Lt Clemm, among other things, on who was who in the squadron and who to watch out for. As Cpt Lovrak explained in her testimony:

> Basically, I was pointing out for her individuals. For example, happily married aircrews on whom she could rely for professional, platonic support. Also pointing out to her members that might have ulterior motives in seeking a close friendship with her. I was concerned for her welfare.

Cpt Lovrak warned 1Lt Clemm against hanging around and drinking with the aircrews. As she testified:

> I talked about my experiences in the fighter squadrons and tried to point out to her that the aircrews who drink together are perceived as, you know, the good old boys, but we're females in Ops [Operations], and when we join them, we look like promiscuous lushes and that's the way we're viewed, especially if we're returning the flirtations. There is a double standard that is unfortunate, but I said don't allow yourself to get in that position, you're walking a dangerous line.

Cpt Lovrak knew in Korea that 1Lt Clemm was married. Apparently 1Lt Clemm's marriage was failing, although no action had been taken to institute divorce proceedings. In Italy, 1Lt Clemm held herself out as single.

November 21, 1995--three days after 1Lt Clemm arrived in country--was a virtual Saturday, and a Thanksgiving party was organized for the entire squadron. The party was held at a hotel near Caorle, Italy, well to the south of Aviano AB on the Adriatic coast. This was the hotel in which the enlisted members of the squadron were quartered, and in which the officers had been quartered until just previously. At the time of the party, the officers were newly quartered in a hotel in the town of Pordenone, about an hour to an hour and a half by car from Caorle, and much nearer to the air base.

After dinner, a large number of the enlisted personnel went down to the beach for a bonfire, but some of the officers and enlisted people remained behind in the hotel bar. It was at this point that numerous members of the squadron began to notice behavior that caused concern.

Cpt Lovrak noticed that, at dinner, 1Lt Clemm had been drinking "excessively, and at the bar she continued to drink excessively." This surprised Cpt Lovrak, "based on our previous--my previous observations and our conversations." 1Lt Clemm "became very physically flirtatious with aircrews at the bar, particularly Major (Maj) Cloutier.[2] Both of them were behind the bar."

Cpt Lovrak painted the scene:

> She [1Lt Clemm] had, at this point, removed her outer sweater and Major--there was probably room just barely for two people to stand behind the bar, between the bar and the back mirrors.

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[2] Maj Michael A. Cloutier was the deployed Director of Operations, or second in command.

> She--Major Cloutier was in back of her. She stood with sometimes a drink in each hand or a drink in one hand, a cigarette in the other, or a cigarette in each hand, and pushed back against him, pressed against him, turned around and had her hands all over his chest. Major Cloutier was making it apparent, I mean, very blatant attempts to sidestep her and get around her, but she would find her way to that very same position.

Cpt Lovrak declined to join the party at the bonfire. As she testified:

> The situation was beginning to deteriorate. It was obvious that people were growing very disgusted with what was going on at the bar, including enlisted personnel that were still standing around. Major Moore and I attempted to get Lieutenant Clemm to come back to the hotel with us and she didn't want to, so I left with Major Moore.

At some point, Maj Cloutier noticed that 1Lt Clemm was behind the bar with appellant mixing drinks. Maj Cloutier testified that "[t]hey were standing in very close proximity to one another." Maj Cloutier "stayed there to monitor the situation. It was an uncomfortable situation for me, because there were still several maintenance [enlisted] individuals present, as well as some of my officers." Maj Cloutier was not alone in this concern.

Eventually, the remaining contingent at the bar began to trickle down to the beach. Maj Hume[3] had previously noticed that appellant and 1Lt Clemm "had struck up a rapport during dinner, is the best way to describe it." At the beach, he noticed that "they came down to the bonfire together, significantly later

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[3] Major David B. Hume was a Flight Commander and an Assistant Operations Officer for the 90th.

than most everyone else. . . . They were engaging people in conversation like they were a couple together at a social function, side-by-side, you know, talking to different people in groups and that sort of thing." Hume testified that "[t]he discussion at the bonfire was that the boss was drunk and we didn't really want him to, you know, pickup on the Lieutenant and make a mistake there."

When Cpt Lange[4] noticed appellant and 1Lt Clemm at the bonfire, he noticed that appellant "had his arm around Lieutenant Clemm's waist." "[H]e had his arm down around her lower waist and their bodies were, you know, they were hip-to-hip." Cpt Lange "felt like there was a relationship being developed there that was inappropriate," in that appellant was the commander and she a subordinate. A number of the officers were discussing the situation, and Cpt Lange hastened to offer 1Lt Clemm his coat, saying, "Lieutenant, you must be cold. Here, take my coat." Appellant declined it, and they moved closer to the fire. Cpt Lange was especially concerned because there were about 20-25 enlisted personnel at the bonfire.

Maj Durtschi[5] and Cpt Morgan[6] both saw appellant with his arm around 1Lt Clemm's waist at the bonfire. Cpt Morgan saw them "coming out of the darkness." It struck him "that they were walking very close to each other, together, bodies touching pretty much all the way down, and [appellant] had his hand tightly around her waist." Cpt Morgan was talking to Cpt Hughes[7] at the time and exclaimed, "Hey, look at that." Cpt Morgan and Cpt Hughes discussed which "one of us was going

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[4] Cpt Douglas E. Lange was the Squadron Electronic Warfare Officer.

[5] Maj James W. Durtschi was an F-15E pilot and an Assistant Director of Operations.

[6] Cpt Eric Morgan was an F-15E pilot.

[7] Cpt Steve D. Hughes was a Flight Commander and considered himself a very good friend of appellant--"as close to a friend as a subordinate can be to a commander." Appellant acknowledged that Cpt Hughes was a friend.

to have to tell [appellant] to stop doing this in front of the enlisted troops."

Cpt Hughes, being a flight commander, was elected. He approached appellant and pulled him away from 1Lt Clemm on the pretext of needing to talk to him about an operational matter. Appellant was reluctant to separate and asked Cpt Hughes if it "could wait." Cpt Hughes replied, "No, sir, I need to talk to you about it now." Cpt Hughes kept appellant away from 1Lt Clemm for about 20 or 30 minutes. As they were finishing the discussion, Cpt Hughes told appellant, "Sir, I think you should kind of keep your distance from Lieutenant Clemm around here, several of the guys have noticed." Appellant acknowledged, in his testimony, that Cpt Hughes had warned him on that occasion that "[t]hat girl is bad news."

Eventually, the bonfire broke up and the officers prepared to return to their quarters at Pordenone. There were nine officers remaining, and two small vehicles. Appellant climbed into the rear seat of his car with 1Lt Clemm.[8] To Maj Cloutier's knowledge, appellant had never sat in the back of his own vehicle before. Cpt Lange was sufficiently concerned about what he had seen that he tried to get into the back seat and get between the two of them. But Maj Cloutier, who undertook to drive, dissuaded him, saying that he would "handle the situation."

Back at the Park Hotel in Pordenone, a group of officers gathered in Maj Cloutier's room on the second floor. The first to arrive was 1Lt Clemm, whose room was directly across the hall. She wanted to smoke a cigarette with Maj Cloutier. Minutes later, they were joined by Majs Durtschi and Hume and Cpts Morgan and Lange.

When Cpt Hughes got back to the hotel, he rode up on the elevator with appellant. Cpt Hughes and appellant were the

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[8] The squadron had a small number of vehicles. One was assigned permanently to appellant; the others were shared.

only members of the squadron billeted on the fourth floor of the hotel. After the third floor, Cpt Hughes and appellant were the only people on the elevator. Once they were alone, Cpt Hughes reiterated his earlier warning to appellant. He told him, "Sir, you know I wouldn't--I'd just kind of go into your bed and not hang around Lieutenant Clemm anymore." Appellant responded, "Yeah, but she would look really good with my dick in her mouth."[9] Cpt Hughes advised him once more against seeing her. Then he made sure that appellant went into his room and closed the door. Finally, Cpt Hughes went into his room and went to bed.

About that time, Maj Durtschi was in the hall outside Maj Cloutier's room on the second floor. He heard 1Lt Clemm's phone ring and saw her go into her room to answer it. Maj Durtschi heard 1Lt Clemm say into the phone, "Yes, you can come down, there are other guys here and we're in [Maj Cloutier's] room." Moments after that conversation, appellant appeared with a bottle of wine and two glasses. He nodded to everyone, sat down with 1Lt Clemm, and poured a glass of wine for the lieutenant and one for himself. Appellant and 1Lt Clemm stayed in the room for 30-45 minutes and then left, one after the other. The remaining officers commenced discussing, for about an hour, the problem that was becoming apparent to them that evening.

The virtual weekend of November 21-22 marked a change in the life of the 90th Fighter Squadron. Thereafter, many officers began noticing that appellant and 1Lt Clemm were spending a great deal of off-duty time together. Maj Hume testified that, after that weekend, "[t]hey spent time together, riding to and from work, and going to the gym, that sort of thing." Maj Hume saw them drive to work together "maybe five or six times," and he saw them leave to go to the gym "two

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[9] Regarding the elevator incident, appellant testified, "I do not remember riding with Captain Hughes up the elevator. I have a lot of trust in Captain Hughes. I have no reason to believe that he's lying. I have no explanation for how that came about."

or three times." Maj Hume noted that the previous Intel Officer, a male, did not ride to work with the commander.

Cpt Morgan saw them together on "numerous occasions, on a pretty much daily basis." This included "[r]iding in the same car to work quite a bit, apparently going to the gym to workout, going to lunch, dinner, et cetera. Just on a fairly regular basis." To Cpt Morgan, the quantum of their togetherness seemed "improper . . . or unusual." Other officers noted similar sightings.

Maj Moore[10] described himself as a born-again Christian, a fact purportedly well known in the squadron. He once observed a degree of physical contact between appellant and 1Lt Clemm in the gym, in which appellant was apparently helping the lieutenant with chin-ups, that Maj Moore thought was compromising and made him feel uncomfortable. So much so, that he "tried to walk back into the room and make a joke of it to kind of break the tension, because it was uncomfortable for me, and I was in another room." Maj Moore also noticed that appellant "wasn't as available as he normally was," that occasionally he was "hard to find."

Maj Cloutier, the second in command, noticed the difference acutely. He had been "joined at the hip" with his boss up until the Thanksgiving party. After that, he was "filtered out of the picture." Whereas before the party, Maj Cloutier rode back and forth to work with appellant, after the party, Maj Cloutier "got to drive home with other people." In the week after the Thanksgiving party, Maj Cloutier was approached by several of his officers "indicating . . . that they thought there was a problem occurring between Lieutenant Clemm and [appellant]." Maj Cloutier was trying "to quell the situation," and saw that his "responsibility is to first take care of my boss." He hoped that the Thanksgiving situation was

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[10] Maj William A. Moore was the Systems Operations Officer during the deployment.

simply a result of too much alcohol, and that it was "just a minor occurrence at that time."

The next virtual weekend was November 29-30. As it happened, on the afternoon of the 28th, an EA6 "took the barrier" at Aviano and closed down the base. Two of the 90th's planes returning from sorties with "live ordnance" were diverted to a nearby, non-U.S.-operated base. Appellant assigned Majs Cloutier and Moore to work the weekend and to manage the return of the aircraft. Appellant wanted a maintenance crew to fly to the other base to check the planes before they took off, but weather prevented the helicopters from flying and kept the maintenance crew at Aviano on the 29th. It was not until the 30th that the planes were recovered.

On the morning of the 29th, a virtual Saturday, Maj Durtschi was off duty, walking in the city of Pordenone. Appellant and 1Lt Clemm, in civilian clothes, were driving alone in a vehicle and they "stopped [Maj Durtschi] on the sidewalk." According to Maj Durtschi, the three of them "had a little chat, and they said they were going to the base to do errands."[11]

At some point that day, Maj Cloutier called appellant on his cell phone to update him on the progress of recovering the two planes. Appellant indicated on the phone that "we are in Maniago knife shopping." Maj Cloutier did not ask who "we" was.[12] Maj Moore also talked to appellant on the phone and confirmed that appellant had said he was in Maniago.

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[11] Appellant had originally been planning a solo trip to Rome that weekend, but called it off the day before. Whether his decision not to go to Rome was made before or after the aircraft diversion was not clarified in the record. 1Lt Clemm was also scheduled to go to Rome that weekend, but in conjunction with an organized trip. She also cancelled her trip.

[12] Appellant denied being in Maniago, saying that "we" were in Maniago, or being with 1Lt Clemm at the time. He testified that he was driving alone and he "could see a Maniago sign," a town a short distance from Aviano. He was indicating that he did not have any idea where he was.

Later that day, in the early evening, Maj Cloutier called appellant back as it was beginning to be clear that they would not be able to get their planes back that day. This time, appellant said that "we are now up in the mountains in a bar."[13] Again, Maj Cloutier did not inquire who "we" was.

When Maj Cloutier returned to the hotel that night, he knocked loudly on 1Lt Clemm's door. She did not respond. He repeated this the next morning when he was heading back to base to try to recover the planes. Again, she did not answer. Maj Cloutier did not see 1Lt Clemm or appellant around the squadron or the hotel that entire virtual weekend.[14]

On the virtual Sunday of that weekend, Majs Cloutier and Moore were again back at base working on recovering the aircraft. Maj Cloutier again called appellant to apprise him of the situation. First, he called appellant's hotel room and got no answer. Then he tried appellant's cell phone and reached him, at about 9 a.m. Appellant said that "it was such a beautiful day, that we decided to drive back up into the mountains again."[15]

On another occasion, identified only as occurring in "early December," Maj Hume had evening duty and called appellant on his cell phone regarding a maintenance matter. After the necessary discussion was concluded, appellant said, "Hummer, I'm up here in the mountains. I'm over an hour away from base, and I'm looking at the stars with a beautiful woman and it's great." Maj Hume noted that appellant "sounded pretty happy."[16]

By early December, rumors were rampant among the aircrews, and the morale of many was plummeting. Maj Hume testified that "the rumor mill was just out of control as far as,

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[13] Appellant denied making this statement.

[14] Maj Cloutier was 1Lt Clemm's immediate supervisor during the deployment.

[15] Appellant testified that he was at a resort area that day, alone.

[16] Appellant's explanation for the statement was, "I was alone in my car, on the perimeter of the base when I made the statement, and it was jokingly."

you know, 'Have you seen them together?' 'What have they been doing together,' that sort of thing. I mean it was the talk of the town." Maj Hume added: "My observations were that people were going to [appellant] trying to tell him to knock off the alleged affair, and that they weren't well received." Cpt Lange testified: "It surprised me that he would do something like this that could have such an effect on his career. It really generated a lack of trust in him, which I felt lowered morale in the squadron." Cpt Morgan testified: "I'll say how I personally felt that the morale went downhill. There's a large trust factor that's associated with a commander and those that follow on. And I felt that trust had been violated . . . ." Cpt Hughes testified that morale "was at an all time low. I'd never--actually, I haven't been in that many squadrons, but I'd never seen a squadron, you know, that disbursed [sic], especially when you have a mission like we had over there to do." Maj[17] Grahn characterized the morale as "definitely going downhill fast." It bothered him because, "we were in a combat situation and if guys were not paying attention to what they were doing, somebody is going to get hurt pretty quick."

In addition to being concerned about what appellant was doing to his career, the officers knew that the aircrews were talking to their wives back at Elmendorf, and that the matter could not long be contained.

December 4 did not fall on a virtual weekend, but that was the day word was received in the squadron that appellant had been selected for Colonel (O-6). Appellant was flying that night, so Maj Cloutier organized the usual fighter pilot sort of reception. As he explained:

> I arranged for a fire truck to meet him. We were going to douse him down when he got out of the airplane. On his arrival, I had everybody stand at--the entire maintenance organization,

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[17] Maj James A. Grahn, a captain at the time of appellant's misconduct, was Assistant Operations Officer and Squadron Weapons Officer for the 90th.

> plus the officers, standing at attention. I had the--it was dark out, so we had the big lights set up with the fire truck right there. As the aircraft pulled in, his aircraft pulled in, everybody went to attention and gave him a salute as he came in.

Champagne followed the dousing.

Walking back to the squadron area, Maj Hume asked appellant, "Sir, are you doing Lieutenant Clemm?" Appellant replied, "No, Hummer, I'm not doing her." But Maj Hume testified that "he looked away from me and looked down with--the best way that I can describe it is a shit-eating grin."

The promotion celebration picked up again later at an establishment near the officers' hotel. On the way back to the hotel after the party, the first of the car-walking incidents occurred. See n. 1, supra.

Back at the hotel, the officers continued to try to protect their commander. As Cpt Hughes explained it:

> [I]t was Captain Grahn that was--we just didn't really assign anybody, he just said "I'm going to take [appellant] back to his room." And Major Cloutier said, "I'll make sure Lieutenant Clemm gets back to her room," because the impression was throughout the squadron that there was something going on between the two of them. We were going to make sure that they got back to their rooms that night.

Up in appellant's room at about 2:30-3:00 a.m., Cpt Grahn brought up the subject of appellant's relationship with 1Lt Clemm. Appellant asked Cpt Grahn if he thought he was sleeping with her. Cpt Grahn replied:

> I said it really didn't matter what I thought. I replied that my impression was that he was sleeping with her, and the impression was--

> really what I was trying to get across to him, was the important thing, that these days we've had a few commanders that--I said we had a few commanders that had been court-martialed or whatever, for inappropriate behavior, inappropriate contacts, and I wanted to make sure he knew that I thought this situation was inappropriate. I just wanted to let him know, so he'd know that.

Asked what appellant's response was to his concerns about the relationship, Cpt Grahn testified:

> He never really told me that it was appropriate or inappropriate, or that he was sleeping with her or he wasn't sleeping with her. It was more of a, you know, kind of treating me like a mother hen, kind of attitude.

At about that point, appellant's phone rang; it was 1Lt Clemm. Appellant told her, "No, Cubes [Cpt Grahn] is here giving me massive shit," and he ended the conversation quickly. After they hung up, Cpt Grahn pointed out to appellant that that was an example of what he was talking about, "a Lieutenant calling an O-6 in his room at three o'clock in the morning." Appellant brushed him off.[18]

Meanwhile, that night, a group of officers had gathered in Cpt Walgren's room. Maj Cloutier was summoned, and the conversation ranged from training issues and topics of the day to appellant's relationship with 1Lt Clemm. The decision was made to bring appellant into the conversation. The officers felt that they needed to take care of their boss, that things had gone far enough and they needed to confront him directly. When appellant arrived, they confronted him with their perceptions.

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[18] Maj Grahn testified about another time the subject of appellant's relationship with 1Lt Clemm came up between them. At one point, appellant held up a book and said, "Hey, Cubes," and showed him the title. It was "International Affairs." Maj Grahn got the joke.

Appellant reacted angrily and defensively. The officers were shocked at his response, and he ultimately walked out on the conversation. Relations between appellant and those officers became exceedingly chilly from that point on.

The next day, December 5, brought two events of consequence. First, Maj Durtschi rotated back to Elmendorf. There he was confronted by Lieutenant Colonel (LtCol) Donisi, who asked him "who had hooked up with Lieutenant Clemm." Maj Durtschi "didn't answer right away," but ultimately he revealed that it was appellant.

Second, concluding that confronting appellant had been fruitless, Maj Cloutier decided to try to confront the other party, 1Lt Clemm. He testified that, in a 5-minute conversation, he warned her about the perceptions that had arisen. 1Lt Clemm promptly told appellant that Maj Cloutier had accused her of having an affair with appellant. Appellant was not happy that Maj Cloutier had confronted 1Lt Clemm.

By December 6, relations between appellant and Maj Cloutier were exceedingly icy. That evening after dinner, the two of them had it out. Appellant announced that he was not pleased with "any of the individuals that confronted me about this situation," and that he was going "to make a few changes in this squadron." Maj Cloutier reviewed the bidding; he explained "why the perceptions are developing, what his actions were that generated such things, and that we were trying nothing more than to protect him." Apparently, the conversation was lengthy and vehement, on both sides.

Ultimately, Maj Cloutier felt he had begun to get through to appellant, and the two of them "settled back down from what was a very tense situation, to more of a comfortable situation." The conversation became "just a frank discussion." Eventually, appellant handed Maj Cloutier a poker chip with the squadron's emblem (the "Pair-O-Dice") on it. Appellant said to Maj Cloutier, "Here, cash this in in five years, and I'll

tell you all about the relationship between the two of us [1Lt Clemm and himself]."[19]

Relations between Maj Cloutier and appellant did not improve, however. Maj Cloutier and others had additional confrontations with appellant about the continuing relationship, and there was an additional car-walking incident. Generally, appellant would not even talk to Maj Cloutier, his second in command.

Maj Cloutier was "very dejected" that he "could not get through" to appellant. The situation was "eating [Maj Cloutier] up," because he felt that "[he was] the one that [was] responsible for taking care of the situation, and [he was] not able to resolve the situation." Early in the morning of December 15, after the second car-walking incident had occurred, Maj Cloutier called LtCol Donisi at Elmendorf. He told LtCol Donisi that he could no longer work for appellant, and he asked LtCol Donisi to help him find a new job.

After concluding the phone call, at about 5:30-6:00 a.m., Maj Cloutier, in uniform, stepped out of his room into the hall of the hotel to go to work. He noticed that 1Lt Clemm's door across the hall was ajar and that her room key was lying on the floor. Knocking and looking into the room, he saw that the bed appeared not to have been slept in. Backing out of the room, he saw 1Lt Clemm coming down the hall toward him. As he testified: "She is in civilian attire, in her socks, with jeans and a T-shirt, and her hair is still a mess, like she has just gotten up."

Caught red-handed sneaking back to her room, 1Lt Clemm confessed to Maj Cloutier that she was having an affair with appellant.[20] She expressed remorse about the relationship,

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[19] Coincidentally or not, the statute of limitations was 5 years. Art. 43(b)(1), UCMJ, 10 USC §843(b)(1). Appellant, as a commander, might be expected to know that.

[20] This admission on December 15, and the following one on December

mentioning that she had recently seen the officers' wives' newsletter and read the portion written by appellant's wife; and "she had felt badly about that." She pledged to Maj Cloutier that she would talk to appellant about ending the relationship.

It was not until the next evening, December 16, that Maj Cloutier had a chance to talk to 1Lt Clemm. As Maj Cloutier testified:

> I inquired, I said, "Well, how did it go?" I said, "Did you have an opportunity to speak with [appellant] today?" She said, "Yes." I said, "Well, how did it go?" She said, "Well, not too well." She said, "I went up there last night to talk to him about it, and I ended up sleeping with him again."

Maj Cloutier said, "Julie, you've got to be kidding me." 1Lt Clemm responded, "Well, when I was leaving this morning, I told him that this should. . . we probably need to knock this off." However, she related that appellant replied to her that he was "not willing to make the commitment not to have the relationship anymore." 1Lt Clemm also indicated that she was changing hotel rooms.

The next morning, December 17, Maj Cloutier discovered that 1Lt Clemm had moved up to the fourth floor, next door

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16, were initially suppressed by the military judge on confrontation and hearsay grounds. Appellant had originally been charged with adultery, but after these admissions were suppressed, the Government withdrew that charge. Subsequently, 1Lt Clemm was called by the members as a court witness, under a grant of testimonial immunity. She denied admitting an affair to Maj Cloutier, and testified that the substance of these conversations was quite different. Thereafter, the Government was permitted to introduce the statements as prior inconsistent statements, for impeachment purposes, accompanied by appropriate limiting instructions. Since the evidence was admitted as a prior inconsistent statement, we have not considered Maj Cloutier's testimony for any other purpose, but rather have limited our review of his testimony to 1Lt Clemm's credibility as a witness.

to appellant's room. 1Lt Clemm had not coordinated the move with the squadron-billeting officer; rather, she made her own arrangements through the hotel staff. 1Lt Clemm would have been well aware that Cpt Reesman, one of the pilots, was also the billeting officer and that he made the room assignment for the squadron, because she assisted Cpt Reesman in that capacity when the officers moved into the hotel.[21]

Also on December 17, Cpt Hughes made another effort with his friend, appellant. As Cpt Hughes explained the situation:

> Things were obviously not going well in the squadron. Here we were. The United Nations troops were just coming into Bosnia. The feeling at the time was that things could flare up over the air responsibility at any time. And there was a definite lack of focus on the part of most--I'd say all the aircrew, in dealing with the threat that was perceived out there. That was directly related to what was going on or perceived to be going on, between the Commander and the Intelligence Officer [1Lt Clemm].

Cpt Hughes continued:

> Eventually we [Cpt Hughes and appellant] went to the gym and we ended up back in his room. It was eight thirty or nine. Went up to have a couple of beers and talk about it. I approached the subject with him, by saying that I was worried about his career, which I definitely was. I was worried about him as, you know, his subordinate, and also as a friend, and I was

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[21] Cpt Reesman was "involved in the same ministry" as Maj Moore and, like Maj Moore, did not take part in the drinking and partying activities of the squadron. The significance of 1Lt Clemm's decision to bypass Cpt Reesman in relocating her room was likely not lost on the members.

> worried about the squadron and what was going to happen to us, if this continued.
>
> So, that's how I approached the subject with him. We talked--talked about various things for two to three hours. Two thirds of it was about what was going on in the squadron. He never said that he had been sleeping with Lieutenant Clemm. He never said that he hadn't been sleeping with her. He asked me what he thought I should do [sic]--he asked me what I would do if I were him, to try to correct the situation. And I told him that I think--I told him I think Major Cloutier's heart is in the right place, that he has the best interest of the squadron in mind, that those two should get together, talk about this as Commander and DO, figure out how to deal with the situation, and then deal with it. Probably it would involve either [appellant] or Lieutenant Clemm going back to Alaska. And once that--they're apart, then everything would probably defuse and we'd go about our business.

Asked how appellant responded to the suggestion that one of them go back to Alaska, Cpt Hughes testified: "Not very well. He didn't like it, didn't like that option at all." Instead, appellant blamed the entire situation on Maj Cloutier's manipulations and deceit.

For Maj Cloutier, 1Lt Clemm's move to the fourth floor was the straw that broke the camel's back. With appellant and 1Lt Clemm "now rooming side-by-side with one another," Maj Cloutier felt "that it's going to break loose," that he himself "will receive retribution for not doing [his] job of reporting it." Maj Cloutier called a meeting of the officers "closest associated with what was going on, because during this entire time, we had tried to keep it very, very quiet." Maj Cloutier told the officers that he was "completely out of ideas on how to handle

this situation, and that [he] was considering going forward with the allegations."

At the conclusion of the meeting, Maj Cloutier decided to go forward with the allegations. He contacted the appropriate higher authorities, and on December 18, presented the information in his possession. Appellant was relieved of his command on December 19, 1995, pending an investigation into allegations of engaging in "an unprofessional relationship." But the saga does not end here.

Maj Moore was detailed to assist appellant in moving out of the hotel immediately, and to escort him on the plane to Elmendorf. Maj Moore described the conversation on the airplane:

> He offered bits and pieces of information. Some of it was that she [1Lt Clemm] had some affairs or something in the past. The conversations were broken because he was, you know, under a lot of thought. He said that she'd had an affair with Klute[22] at one point, it was--Major Cloutier, excuse me.

Asked whether appellant had said anything regarding the squadron, Maj Moore continued:

> Well, he did make a comment that kind of--I wouldn't say it alarmed me, but he said he didn't know how deep he and Donna would have to go to right this or to--how deep he would have [to] dig into the squadron affairs. Something about this may be "me and Julie against the whole Air

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22 "Klute" was apparently Maj Cloutier's call sign. There is no assertion, even from 1Lt Clemm, that she had had an affair with Maj Cloutier. Given the short duration that she knew Maj Cloutier, it is inconceivable on this record that this particular assertion, if indeed accurately related, was correct.

> Force by the time it's all over." He told me the results would be earth-shattering.[23]

Cpt Lovrak had departed Italy on December 2 and returned to Elmendorf. She was called back to Italy to escort 1Lt Clemm back to Elmendorf. After they arrived back in Alaska, 1Lt Clemm called Cpt Lovrak "about ten to 12 times. She initiated the phone calls." According to Cpt Lovrak, 1Lt Clemm

> often called late at night, but the one occasion she called me very late, and very distraught. . . . She was crying. . . . She talked about the, you know, the sort of --some of the legal issues that were pending, without being very specific. Talked about her arguments with her parents, and was very quiet for a moment. Then she blurted--she blurted out, "You warned me about Major Cloutier, but you didn't warn me about [appellant].

Regarding the reference to appellant, Cpt Lovrak testified, "It was--boy, it was one of those statements that is so pregnant with meaning." Cpt Lovrak did not follow up and pursue the statement, however, because she had been advised by the Legal Office "to make a wide berth around any specifics regarding this case." She had been instructed not to ask questions, but to "change the subject" and "move on," and she did.

Regarding the reference to Maj Cloutier, Cpt Lovrak clarified that she had not, in fact, warned 1Lt Clemm about him. She told 1Lt Clemm that "Major Cloutier loves to party

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[23] Maj Moore was asked about another conversation he had had with appellant at some point in the deployment. The O.J. Simpson verdict had been announced, and appellant asked Maj Moore if he believed "God viewed all sin as equal in his eyes." Maj Moore responded, "Yes." Appellant continued, asking "whether or not, for example, is murder and adultery on equal basis in God's eyes[?]" Maj Moore responded affirmatively, that he believed it was.

and loves women, but I never cautioned her, you know, that he would come on to her. I would never have expected him to come on to Lieutenant Clemm, and she never gave me any indication that he had."

Issue I

*Was the Specification Vague?*

Appellant contends that the specification of Charge II, alleging conduct unbecoming an officer, was vague in that it "failed to identify a relevant custom or regulation which prohibits relationships between officers."

In its entirety, Article 133, UCMJ, 10 USC § 933, provides:

> Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

Thus, by its terms, Article 133 contains no requirement of proof of violation of a service regulation or custom. Reference to para. 59, Part IV, Manual for Courts-Martial, United States (1995 ed.)(conduct unbecoming an officer), in effect at the time of the underlying conduct at bar, produces a similar conclusion.[24]

Indeed, in the instant case, the specification of Charge II did not allege that appellant had violated a service regulation or custom. It alleged:

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[24] In contrast, a charge of "fraternization" (the improper association of an officer and an enlisted servicemember) under Article 134 requires proof of violation of a "custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality." Para. 83, Part IV, Manual for Courts-Martial, United States (1995 ed.); see generally United States v. Johanns, 20 MJ 155 (CMA 1985). Similarly, a charge of violating a lawful regulation under Article 92, UCMJ, 10 USC § 892, requires proof of a violation of a "punitive" regulation. See United States v. Shavmoch, 49 MJ 334, 336 (1998).

> In that LIEUTENANT COLONEL SHELLEY S. ROGERS, United States Air Force, 90th Fighter Squadron, at or near Pordenone, Italy, did, between on or about 20 November 1995 and on or about 18 December 1995, wrongfully and willfully develop an unprofessional relationship of inappropriate familiarity with First Lieutenant Julie Clemm, a subordinate under his command, which conduct under the circumstances was unbecoming an officer and a gentleman.

Tailoring his instructions on the elements to the allegations, the military judge instructed the members as follows:

> In the Specification of Charge II, the accused is charged with the offense of conduct unbecoming an officer and a gentleman. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence, beyond a reasonable doubt, that:
>
> One, between on or about 20 November 1995 and 18 December 1995, at or near Pordenone, Italy, the accused wrongfully and willfully developed an unprofessional relationship of inappropriate familiarity with First Lieutenant Julie Clemm.
>
> Second, First Lieutenant Julie Clemm was a subordinate under the command of the accused.
>
> And third, under the circumstances, the accused['s] conduct [was] unbecoming an officer and a gentleman.

Further, the military judge defined certain key terms and phrases as follows:

> "Conduct unbecoming an officer and a gentleman" means behavior in an official

capacity, which in dishonoring or disgracing the individual as a commissioned officer, seriously distracts or detracts from his character as a gentleman, or behavior in an unofficial or private capacity, which in dishonoring or disgracing the individual personally, seriously detracts from his standing as a commissioned officer.

"Unbecoming conduct" means behavior more serious than slight, and of a material and pronounced character. It means conduct morally unfitting and unworthy, rather than merely inappropriate or unsuitable, misbehavior which is more than opposed to good taste or propriety.

"Unprofessional relationships" are those personal relationships between officers, which result in inappropriate familiarity or create the appearance of favoritism, preferential treatment, or impropriety. Unprofessional relationships create the appearance that personal friendships and preferences are more important than individual performance and contribution to the mission. The term "unprofessional relationships" refers not to any one specific occurrence, but to the totality of the circumstances. Not all contact or association between and [sic] a superior officer and a subordinate officer is an offense. Whether the contact or association in question is an offense, depends upon the surrounding circumstances.

In Parker v. Levy, 417 U.S. 733, 752, 757-58 (1974), Article 133 survived a claim that it was "'void for vagueness' under the Due Process Clause of the Fifth Amendment and overbroad in violation of the First Amendment." The Supreme Court noted that our Court and other military courts had "narrowed the very broad reach of the literal language of the articles [Arts. 133

and 134], and at the same time ha[d] supplied considerable specificity by way of examples of the conduct which they cover." Id. at 754. The Court cited approvingly our invocation of Colonel Winthrop's venerable observation on conduct unbecoming an officer:

> To constitute therefore the conduct here denounced, the act which forms the basis of the charge must have a double significance and effect. Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents.

William Winthrop, Military Law and Precedents 711-12 (2d ed. 1920 Reprint); see 417 U.S. at 753-54.

The Supreme Court acknowledged, however, that "[i]t would be idle to pretend that there are not areas within the general confines of the articles' language which have been left vague despite these narrowing constructions." Id. at 754. Where "areas of uncertainty as to the coverage of the articles . . . remain[ed]," the Court added that "further content may be supplied . . . by less formalized custom and usage." Id. (emphasis added). Nothing in the opinion intimated that proof of a custom or usage was a requirement.

On the other hand, the Supreme Court noted "there is a substantial range of conduct to which both articles clearly apply without vagueness or imprecision." Id. And the Court made it clear that an officer charged with an Article 133 offense must have fair notice that his or her conduct was punishable. 417 U.S. at 755-57. Although there have been occasional hints by some judges of our Court that proof of a service custom or regulation may be a requirement of Article 133 prosecutions

generally, e.g., United States v. Kroop, 38 MJ 470, 473 (CMA 1993), that view, as then-Chief Judge Sullivan noted, "has not commanded a majority of this Court," with the possible exception of officer-enlisted "fraternization" cases charged under Article 133, instead of Article 134. United States v. Boyett, 42 MJ 150, 159 (1995)(Sullivan, C.J., concurring in the result).

In the instant case, there is no question that appellant was on notice of what sorts of relationships were impermissible. Albeit it was an apparently nonpunitive regulation, an Air Force Instruction in effect at the time of the charged conduct proscribed, and gave examples of, unprofessional relationships. It stated:

> Relationships in the Same Chain of Command, the Same Unit, or a Closely Related Unit. Personal relationships between members of different grades or positions within an organization or chain of command can easily become unprofessional. Dating and indebtedness commonly get out of hand because they appear to create favoritism or partiality. Consequently, senior members should not date or become personally obligated or indebted to junior members. This is also because seniors have, or are perceived to have, authority to influence the junior member's career.[25]

Paragraph A1.3.1., AFI 36-2909 (20 Feb. 1995)(emphasis added).

Further, as commander, appellant had occasion to both discuss and apply the standards relating to personal relationships. Cpt Lovrak testified that she and appellant had had "several" professional discussions on the subject, even

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25 We decline to attempt to walk a line between "dating" and the evidence adduced at appellant's court-martial.

before the deployment to Italy, particularly concerning a relationship that involved a senior noncommissioned officer. Appellant acknowledged in his testimony having "many discussions of professionalism" with Cpt Lovrak, "each one may have been related to another act or incident." Appellant also had to deal with at least one relationship matter in Italy, involving enlisted members within 1Lt Clemm's intelligence section.

In sum, the granted issue asks whether the specification was unconstitutionally vague in failing to allege violation of a regulation or custom of the service which forbade a relationship such as his and 1Lt Clemm's. The Constitution, however, does not require that a regulation or custom of the service be established.

Obviously, there will be many gradations of relationships and associations between servicemembers that will not put the parties fairly on notice that the conduct might be inappropriate. However, as the Supreme Court suggested in Parker v. Levy, supra, there is certain conduct to which Article 133 "clearly appl[ies] without vagueness or imprecision." 417 U.S. at 754. Under the circumstances of this case, we are satisfied that appellant's conduct falls into this latter category. See United States v. Frazier, 34 MJ 194 (CMA 1992). Any officer would be on notice that this type of behavior was punishable. We hold that the granted issue is without merit.

Issue II

Failure of Specification to Identify Acts Which Constituted the Unprofessional Relationship

Appellant's misperception of this issue represents more than a matter of mere semantics. The conduct appellant was charged with was "wrongfully and willfully develop[ing] an unprofessional relationship of inappropriate familiarity." The "acts" appellant refers to did not "constitute" the relationship, they evidenced it.

In regard to the evidence of the "acts" that was to be proffered at trial, appellant was well on notice. A Bill of Particulars, produced in limine by the prosecution, outlined the core events and evidentiary matters the Government intended to introduce. Although necessarily abbreviated, the fullness of their significance could hardly have failed to resonate in that the defense had previously been provided a copy of the 4-volume Article 32, UCMJ, 10 USC § 832, Investigating Officer's Report. This document contained both the sworn pretrial statements and the summarized or verbatim testimony of all of the Government's significant witnesses.

Taken in conjunction with the Bill of Particulars, the Government had disclosed, in essence, all of the evidence it possessed in order to prove the nature of the relationship. This granted issue is without merit.

Issue III

Legal Sufficiency of Evidence

As previously indicated, it is not our function to reweigh evidence and determine guilt or innocence anew. Rather, our responsibility is to ascertain whether the finder of fact had a legally sufficient basis to reach the conclusion it did. Indeed, as pertained to virtually every evidentiary matter presented by the prosecution, the defense either denied the act or statement, or presented it with a different content and meaning. The court members,[26] however, apparently found the credibility of appellant and 1Lt Clemm to be insufficient even to raise a reasonable doubt as to guilt. We, in turn, are satisfied that the evidence presented by the prosecution was enough that "a reasonable factfinder could have found all the essential elements beyond a reasonable doubt." United States v. Turner, supra; Jackson v. Virginia, supra.

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[26] This particular panel was comprised of seven colonels and a lieutenant colonel, all on loan from other installations and commands.

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

SULLIVAN, Judge (concurring):

I agree with the majority's resolution of the granted issues. Long ago, in my separate opinion in United States v. Boyett, 42 MJ 150, 160-61 (1995) (Sullivan, J., concurring in the result), I concluded that a custom or regulation was not constitutionally required for a valid prosecution under Article 133, UCMJ. I said:

III

FAIR NOTICE THAT CONDUCT VIOLATED ARTICLE 133

The second issue in this case is whether appellant was provided fair notice that his conduct was a crime under Article 133. Clearly, Parker v. Levy, [417 U.S.] at 755-57, 94 S.Ct. at 2561-62, provides that at least constructive notice of the criminality of a servicemember's conduct is required by the Due Process Clause of the Fifth Amendment. Such notice can be shown by proof of an authoritative court decision including such conduct as punishable under Article 133; a provision of the Manual for Courts-Martial explaining conduct as a violation of Article 133; or a custom of the service prohibiting such conduct or any other circumstance which would establish that a servicemember would have no reasonable doubt that his conduct was unbecoming an officer. Id. In United States v. Johanns, 20 MJ at 161, this Court simply held that Captain Johanns in 1982 did not have adequate notice from any of the above sources or anywhere else that his conduct was proscribed under Article 133.

Those circumstances exist in this case, where appellant's conduct with a female subordinate officer clearly undermined his status as head of his squadron. See United States v. Frazier,

34 MJ 194 (CMA 1992) (officer undermined his ability to lead by open and overly familiar relationship with enlisted man's wife). An obvious leadership failure existed in this case, which was not only observed by subordinates but was expressly called to appellant's attention by them. Accordingly, appellant's prosecution for this Article 133, UCMJ, offense was constitutionally proper.

EFFRON, Judge (concurring in part and dissenting in part):

For the reasons set forth below, I agree that the Charge, in light of the bill of particulars, was sufficient to state an offense and provide fair warning of the criminality of the conduct at issue. I do not agree that the evidence was sufficient to prove the offense alleged.

I. Legal Sufficiency of the Charge

Article 133, UCMJ, 10 USC § 933, proscribes "conduct unbecoming an officer and a gentleman." The Supreme Court, in Parker v. Levy, 417 U.S. 733, 756 (1974), indicated that such a statute might be void for vagueness under the standards applicable to criminal offenses in the civilian sector. The statute could be sustained in the military context, however, so long as the person had received "fair warning of the criminality" of his or her conduct. The Court relied in significant part on the decisions of this Court and the language in the Manual for Courts-Martial that had "narrowed the very broad reach of the literal language of the articles, and at the same time ha[d] supplied considerable specificity by way of examples of the conduct which they cover." Id. at 753-54. The Court also noted that "further content may be supplied . . . by less formalized custom and usage." Id. at 754. The guidance in the Manual for Courts-Martial plays a vital role in the assessment of the legality of the Charge. With respect to the offense of conduct unbecoming an officer and a gentleman under Article 133, the Manual notes:

> There are certain moral attributes common to the ideal officer and the perfect gentleman . . . . Not everyone is or can be expected to meet unrealistically high moral standards, but there is a limit of tolerance based on customs of the service and military necessity below which the personal standards of an officer, cadet, or midshipman cannot fall without seriously compromising the person's standing as an officer, cadet, or midshipman or the person's character as a gentleman. This article prohibits conduct by a commissioned officer, cadet, or midshipman which, taking all the circumstances into consideration, is thus compromising.

Para. 59c(2), Part IV, Manual for Courts-Martial, United States (2000 ed.). The Manual reflects traditional military law. Winthrop, in his authoritative treatise, noted with respect to an earlier version of the statute:

> Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents.

William Winthrop, Military Law and Precedents 711-12 (2d ed. 1920 Reprint) (footnote omitted).

The comments by the President in the Manual and Winthrop in his treatise reflect two tiers of disciplinary infractions under military law. The first tier includes matters that amount to flaws or deficiencies in performance or conduct that are not crimes, either in the traditional or uniquely military sense. See generally United States v. Wheatley, 10 USCMA 537, 28 CMR 103 (1959)(careless or thoughtless act of officer not

necessarily criminal). Infractions not amounting to UCMJ offenses may be addressed through administrative measures, such as those listed in RCM 306(c)(2), Manual, supra, and the Discussion thereunder. The second tier includes matters that not only involve deficiencies in performance or conduct, but which also constitute offenses under the UCMJ. These matters can be dealt with either under the UCMJ or through administrative actions. See RCM 306(c)(1)-(5), 401-04, and 407.

The Manual expressly addresses the subject of officer-enlisted relationships in paragraph 83, Part IV (Fraternization), providing a basis for differentiating between those relationships that are punishable under the UCMJ and those that are either permissible or that may be addressed solely through administrative measures. The Manual, however, does not provide similar guidance with respect to the relationships between officers of different grades.

United States v. Kroop, 38 MJ 470 (CMA 1993), is our most recent precedent governing relationships between officers of different ranks. Kroop involved a charge of "undue familiarity" and "excessive social contacts" between a married male lieutenant colonel (LtCol) and a married female second lieutenant detailed to his squadron. LtCol Kroop pled guilty to the Charge but challenged the findings on appeal. The Court of Military Review affirmed the findings only insofar as the Charge pertained to adultery and set aside that portion of the findings concerning "undue familiarity" and "excessive social contacts." 34 MJ at 634-36. The Judge Advocate General certified the case to our Court.

The opinion of Senior Judge Everett, joined by Judge Wiss, addressed two aspects of the Charge. First, it stated that "[i]n the absence of further allegations as to the details of the conduct involved or the service custom violated, we are concerned about the imprecision of this language." 38 MJ at 472. Second, it noted that in 1989, at the time of the charged conduct, "no custom of that service" and "no Air Force

Regulation prohibited such conduct." Id. at 473. Judges Everett and Wiss concluded that neither Article 133 nor Article 134 was violated by "private sexual intercourse between an officer and his or her superior, unaccompanied by any element of harassment or coercion on the part of the superior and any allegation of violation of an applicable custom or regulation . . . ." Id.

Chief Judge Sullivan concurred in part and in the result, limiting his views to agreement with a comment by Senior Judge Everett that the language excised by the Court of Military Review could be viewed as "surplusage" in the context of an adultery charge. Id.

Judge Gierke, in dissent, stated that the allegation of "undue familiarity" and "excessive social contacts" with a married female servicemember was sufficient to state an offense under Article 133. He noted: (1) the case involved a guilty plea in which the accused had not challenged the sufficiency of the specification at trial; (2) under those circumstances, the standard of review as to legal sufficiency was lower on appeal than in a case where the specification had been challenged at trial; and (3) the accused had not asked for a bill of particulars or in any way asserted at trial that the specification was too vague. Id. at 474-75.

Judge Cox expressed agreement "with almost everything" in Judge Gierke's dissent, but he concurred in the result because he viewed the decision of the Court of Military Review as doubting that "this particular conduct was of such a character as to rise to conduct unbecoming an officer." Id. at 473.

In view of the split opinions in Kroop and the fact that it was viewed as involving private behavior, it does not provide a precedent that would clearly govern the present case. At a minimum, Kroop suggests that pleading and proof of a custom or regulation, or production of a bill of particulars, may be

sufficient to rebuff a challenge to such a specification in a contested case.

Subsequent to our decision in Kroop, the Air Force revised Instruction (AFI) 36-2909, entitled "Fraternization and Professional Relationships," effective February 20, 1995. The parties to the present case agree that the 1995 version of the Instruction was non-punitive, in the sense that violations were not punishable under Article 92, UCMJ, 10 USC § 892 (failure to obey a lawful order or regulation).

With respect to officers, the 1995 Instruction defined "[u]nprofessional [r]elationships" as "[p]ersonal relationships between officers . . . which result in inappropriate familiarity or create the appearance of favoritism, preferential treatment, or impropriety." Para. A1.1.2. With respect to officers within the same chain of command, unit, or closely related unit, the Instruction noted:

Personal relationships between members of different grades or positions within an organization or chain of command can easily become unprofessional. Dating and indebtedness commonly get out of hand because they appear to create favoritism or partiality. Consequently, senior members should not date or become personally obligated or indebted to junior members. This is also because seniors have, or are perceived to have, authority to influence the junior member's career.

Para. A1.3.1. The Instruction also defined fraternization (officer-enlisted relationships) and noted that fraternization was subject to criminal prosecution under the UCMJ as service discrediting and prejudicial to good order and discipline. Para. A1.1.3. No such language was included with respect to unprofessional relationships between officers; rather, the

Instruction simply noted that such relationships "become a matter of official concern." Para. A1.3.2.[1]

The current version of AFI 2909 (1 May 1999), issued subsequent to the events at issue in this appeal, contains a more detailed description of the nature of unprofessional relationships. In addition, the new Instruction indicates that commanders will use "a stepped approach to enforcement of the policy" regarding unprofessional relationships. Id. (Summary of Revisions). Under the stepped approach, a commander first will issue an order "to cease an unprofessional relationship"; then, if the officer does not adhere to the order, the commander will consider "prosecution under the UCMJ for violation of the order." Para. 4. The two-step approach is reinforced in paragraph 8 of the Instruction, "Actions in Response to Unprofessional Relationships," which provides that corrective action

> should normally be the least severe necessary to terminate the unprofessional aspects of the relationship. The full spectrum of administrative actions is available and should be considered. . . . Experience has shown that counseling is often an effective first step in curtailing unprofessional relationships. . . . An order to terminate a relationship, or the offensive portion of a relationship, can and should be given whenever it is apparent that lesser administrative action may not be effective. Officers or enlisted members

[1] Paragraph 2 of the Instruction directed commanders to take the following "corrective action" with respect to relationships having an adverse effect on their units:

2.1 Consider administrative actions . . . .

2.2 Consider punitive action, when appropriate, especially for favoritism, partiality, or misuse of grade or position, which may be violations of the Uniform Code of Military Justice (UCMJ). Fraternization is a violation of the UCMJ.

who violate such orders are subject to action under the UCMJ for violation of the order.

This current Instruction reflects a recognition by the Air Force that it is difficult to provide a definitive set of rules governing the wide variety of personal interactions between officers of different ranks, and that an order can serve to focus the attention of an officer on the limits of his or her relationships with particular subordinates.

In a case such as this, where there has been a bill of particulars, it is not necessary to address the question of whether the specification, standing alone, provides sufficient notice that the conduct in question was proscribed by Article 133. Instead, it is appropriate to look at the bill of particulars in conjunction with the guidance in the Instruction, the Manual, case law, or custom.

During the initial stages of the trial, the defense moved to dismiss the specification at issue on the grounds that it failed to state an offense. The Government responded by furnishing a bill of particulars.[2]

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[2] The bill of particulars identified the following circumstances in support of the Charge:

1. Testimony surrounding the 21 November 1995 Thanksgiving party in Caorle, Italy. This includes the ride back to Pordenone, Italy, statements made by the accused in the elevator to Captain Hughes and the subsequent gathering in Major Cloutier's hotel room.
2. Observations in November and December 1995 from members of the squadron concerning frequency of off-duty contacts between the accused and his subordinate Intelligence Officer, 1Lt [First Lieutenant] Clemm.
3. Testimony that the accused and 1Lt Clemm spoke to each other on the telephone from their respective hotel rooms in the middle of the night on more than one occasion.
4. Lt Clemm's statements to Major Cloutier admitting to having an affair with the accused and her inability to stop the affair.
5. Testimony from various squadron personnel concerning their perceptions of the accused and 1Lt Clemm as they pertain to confrontations with the accused and his reactions to their confrontations.
6. Statements that 1Lt Clemm made to Captain Lovrak that "you warned me about [other aircrew] but you didn't warn me about LtCol Rogers."

The centerpiece of the bill of particulars was item 4, the allegation that 1Lt Clemm admitted to Major Cloutier that she was having an affair with appellant. The balance of the bill of particulars involved circumstantial evidence from which inferences could be drawn corroborating the existence of an affair and its negative impact on the command.

The bill of particulars was more than sufficient to provide adequate notice of conduct unbecoming an officer and a gentleman. Whatever limits there may be on the reach of Article 133 into discreet, private conduct, the circumstances referenced in the bill of particulars were well within the range of conduct proscribed by military law. I am confident that no field grade officer holding a position of command in any of the armed forces could have reasonably believed in 1995 that he or she would not risk a court-martial for having an affair with a subordinate junior officer under the circumstances described in the bill of particulars.

II. Legal Sufficiency of the Evidence

A bill of particulars may provide the basis for sustaining the legal sufficiency of a charge, but it does not address the legal sufficiency of the evidence actually introduced on the merits. At trial, 1Lt Clemm denied that she had been involved in an affair with appellant, and she denied making a statement to Major Cloutier admitting to such an affair. As a result, the only evidence of her statement was Major's Cloutier's assertion that 1Lt Clemm had, in fact, made such an admission.

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7. Statements made by the accused to Major Cloutier concerning the "dice poker chip."
8. Statements by the accused while on his cellular phone to Major Hume that he was in [the] mountains with a beautiful woman, and a statement to Major Cloutier that "we" are in the mountains.
9. Major Durtchi's observations of the accused and 1Lt Clemm riding in a car together on a non-duty day in civilian clothes.
10. Failure of the accused to advise 1Lt Clemm to have her room changed again when he discovered that she had moved into the room next to his.

The military judge ruled that Major Cloutier's recollection of her statement constituted hearsay that was inadmissible on the merits of the Charge, although he permitted it to be used, under proper limiting instructions, as a prior inconsistent statement to impeach 1Lt Clemm's trial testimony denying the affair. See Mil. R. Evid. 613, Manual, supra. Because it was excluded as substantive evidence on the merits, her statement may not be considered during appellate review of the question whether the evidence was legally sufficient to support the charged offense.

Absent her admission, the remainder of the prosecution's case consisted of a variety of incidental touchings, social encounters, warnings to appellant about the impact of his interactions with 1Lt Clemm on the discipline and morale of the unit, and appellant's actions in response to those expressions of concern. Without her admissions, the evidence reflected the speculation of others as to the possibility of an inappropriate relationship, but did not provide a legally sufficient basis upon which a reasonable factfinder could have concluded, beyond a reasonable doubt, that appellant's conduct with 1Lt Clemm crossed the line from permissible interaction to an illegal unprofessional relationship of inappropriate familiarity. See United States v. Turner, 25 MJ 324 (CMA 1987), citing Jackson v. Virginia, 443 U.S. 307, 319 (1979).

That conclusion, however, does not mean that the Air Force was precluded from holding appellant accountable for his conduct. Aside from the plethora of administrative actions that could have been taken with respect to matters such as efficiency reports, assignments, and promotions, appellant could have been held accountable in a court-martial for the offense of dereliction of duty under Article 92 or as a related charge under Article 133. The evidence makes abundantly clear that, from the outset of appellant's interactions with 1Lt Clemm, members of his command repeatedly called his attention -- as squadron leader -- to the deleterious impact of these interactions on the good order and discipline of the unit.

Although these admonitions were brought to appellant's attention with increasing frequency and bluntness, he not only chose to ignore these expressions of concern -- but he also willfully engaged in conduct that further undermined the morale of the unit, a unit actively engaged in combat operations. As squadron leader, he had a particular responsibility to set an example. Instead of conducting himself in a manner that would ensure that his interactions with 1Lt Clemm were limited to those necessary for their professional relationship, he repeatedly placed himself in situations which affected morale within the unit and which caused reasonable concern among the officers and enlisted members of his unit. Rather than making it clear to his subordinates that his relationship with 1Lt Clemm was confined to professional interaction, he inflamed the situation through comments suggesting that he viewed her as a sexual object rather than as a military officer.

This is not a case of an isolated remark in a private conversation, nor does it involve a stray, careless or thoughtless act. It also does not involve a relationship in which the parties endeavored to act with discretion and circumspection. The case before us involves a commanding officer who -- knowing of concerns within his unit about his relationship with a subordinate -- repeatedly acted with flagrant disregard of the consequences upon his unit that would result from his remarks and his visible interactions with that subordinate.

Under the circumstances of this case, I would have had no difficulty in concluding that a reasonable fact-finder could have found that appellant did not conduct himself as an officer and a gentleman when he permitted the degradation of the morale, good order, and discipline of his unit by taking actions that further aggravated the reasonable concerns of members of his unit and that had been repeatedly called to his attention. Given the way the case was charged and prosecuted, however, it would be difficult to hold that a dereliction charge would be fairly embraced within the Charge. In light of the

Government's decision to center its prosecution on the existence of an inappropriate relationship rather than on appellant's dereliction of duty, I would dismiss the Charge and remand the case for a rehearing on sentence.

## Appendix B

**UNITED STATES,**

**v.**

**Lieutenant Colonel Shelley S. ROGERS,**
**United States Air Force.**

**ACM 32711**

U.S. Air Force Court of Criminal Appeals

Sentence Adjudged 20 Sept. 1996.

Decided 3 May 1999.

OPINION OF THE COURT

YOUNG, Senior Judge:

Court members convicted the accused of conduct unbecoming an officer by engaging in an unprofessional relationship with a subordinate officer in his chain of command, and disorderly conduct of a nature to bring discredit upon the armed forces. Articles 133 and 134, UCMJ, 10 U.S.C. §§ 933, 934. He was sentenced to total forfeitures for 4 months and a reprimand. The convening authority disapproved that portion of the disorderly conduct specification alleging service-discrediting conduct, and reduced the sentence to forfeiture of $2,789 pay per month for 4 months.

Pursuant to Article 69(a), UCMJ, 10 U.S.C. § 869(a), the case was forwarded to The Judge Advocate General for review. *See* Rule for Courts-Martial (R.C.M.) 1201(b). The accused assigned several errors for review: (1) The specification alleging conduct unbecoming an officer fails to state an offense; (2) The evidence is legally insufficient to sustain the convictions; (3) The convening authority's modification of the disorderly conduct offense was unlawful; and (4) Government misconduct resulted in a violation of due process. The Judge

Advocate General referred the case to this Court, pursuant to Article 69(d), UCMJ, 10 U.S.C. § 869(d), and invited our attention to an additional issue: Does the offense of engaging in an unprofessional relationship with another officer require proof of a custom of the service or a violation of a regulation prohibiting such conduct? As this question is intertwined with the legal sufficiency issue, they will be discussed together. When reviewing cases referred to us under Article 69, UCMJ, we may take action only with respect to matters of law. Article 69(e), UCMJ, 10 U.S.C. § 869(e).

**I. Failure to State an Offense**

A. Background

The specification of Charge II alleges that the accused did, "between on or about 20 November 1995 and on or about 18 December 1995, wrongfully and willfully develop an unprofessional relationship of inappropriate familiarity with First Lieutenant Julie Clemm, a subordinate under his command, which conduct under the circumstances was unbecoming an officer and a gentleman." At trial and before us, the accused asserts that the specification does not state an offense because (1) it failed to allege that the accused's conduct violated a custom of the service, and (2) it failed to identify any specific acts which amounted to displays of undue familiarity. We hold that the specification does state an offense.

B. Law

Under the early common law, an indictment had to charge an offense with precision and technical accuracy. Failure to strictly conform to the formal pleading requirements led to dismissal of the charge. 41 Am. Jur. 2d, *Indictments and Informations* § 90 (1995). The modern practice is not so strict.

> The rigor of old common-law rules of criminal pleading has yielded, in modern practice, to the general principle that formal defects, not prejudicial, will be disregarded. The true test of

> the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, "and sufficiently apprised the defendant of what he must be prepared to meet, and in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

*Hagner v United States*, 285 U.S. 427, 431 (1932) (quoting *Codman and Sayre v United States*, 157 U.S. 286, 290 (1895)). *Accord Harling v United States*, 418 U.S. 87, 117 (1974).

The military is a notice-pleading jurisdiction. *See United States v Sell*, 11 C.M.R. 202, 206 (C.M.A. 1953) (quoting *Hagner*, 285 U.S. at 431, but without citation); *United States v Calamita*, 48 M.J. 917, 920 n.1 (A.F. Ct. Crim. App. 1998), *pet. denied*, __ M.J. __ (1999); *United States v Smith*, 40 M.J. 432, 436 (A.B.R. 1968); *United States v Wright*, 35 C.M.R. 546, 551 (A.B.R. 1964); *United States v Wheeler*, 27 C.M.R. 888, 892 (N.B.R. 1959). We have followed "the modern tendency . . . toward allowing the pleading of legal conclusions and the elimination of detailed factual allegations from counts charging misconduct." *United States v Williams*, 31 C.M.R. 269, 271 (C.M.A. 1962). *See United States v Alcantara*, 40 C.M.R. 84 (C.M.A. 1969) (holding a larceny specification alleging the theft of not further described "foodstuffs" was sufficiently definite to allege an offense).

In the military, a specification informs an accused of the allegations against him. The President has defined the specification as "a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. No particular form is required." R.C.M. 307(c)(3).

The Court of Appeals for the Armed Forces has fashioned a three-pronged test for determining whether a specification states an offense. The specification must provide "(1) the essential elements of the offense, (2) notice of the charge, and (3) protection against double jeopardy." *United States v Dear*, 40 M.J. 196, 197 (C.M.A. 1994). Because these specifications were challenged at trial, we must examine them more critically than if the challenge was first raised on appeal. *United States v French*, 31 M.J. 57, 59 (C.M.A. 1990).

C. Discussion

The essential elements of the offense of conduct unbecoming an officer are: "(1) That the accused did or omitted to do certain acts [wrongfully and willfully develop an unprofessional relationship of inappropriate familiarity with First Lieutenant Julie Clemm, a subordinate under his command]; and (2) That, under the circumstances, these acts or omissions constituted conduct unbecoming an officer and a gentleman." *Manual for Courts-Martial, United States (MCM)*, Part IV, ¶ 59b (1995 ed.).

The President has explained the offense of conduct unbecoming an officer under Article 133 as follows:

> Conduct violative of this article is action or behavior in an official capacity which, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character as a gentleman, or action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer. There are certain moral attributes common to the ideal officer and the perfect gentleman, a lack of which is indicated by acts of dishonesty, unfair dealing, indecency, indecorum, lawlessness, injustice, or cruelty. Not everyone is or can be expected to meet

> unrealistically high moral standards, but there is a limit of tolerance based on customs of the service and military necessity below which the personal standards of an officer . . . cannot fall without seriously compromising the person's standing as an officer . . . or the person's character as a gentleman. This article prohibits conduct by a commissioned officer . . . which, taking all the circumstances into consideration, is thus compromising.

*MCM*, Part IV, ¶ 59(c)(2).

In applying the *Dear* test to the accused's case, it is apparent that the specification provides the accused protection against double jeopardy. The accused's conviction on the charged offense would preclude conviction for virtually any other offense alleging an unprofessional relationship with Lt Clemm during the charged period. Furthermore, because the accused may rely on his record of trial in raising a claim of double jeopardy, it is questionable whether the specification needs to be specific enough to do so alone. *Dear*, 40 M.J. 197 (citing *United States v Williams*, 21 M.J. 330, 332 (C.M.A. 1986)).

The accused asserts, in one assigned error, that the specification failed to state an offense because it did not allege a relevant custom or regulation which prohibits unprofessional conduct. In his brief, the accused mixes the concepts of the adequacy of the notice in the specification and the adequacy of notice in the statute. While the concepts are analogous, they are somewhat different. When examining the adequacy of Article 133, the statute, the focus is on whether one could reasonably understand that his contemplated conduct is criminal. *See Parker v Levy*, 417 U.S. 733, 757 (1974) (holding Article 133 is neither unconstitutionally vague nor facially invalid for overbreadth). When examining the adequacy of the notice in a specification, the focus is on whether the accused had adequate

information to place him on notice of the allegation against which he must be prepared to defend. *Hagner*, 285 U.S. at 431.

The accused cites *United States v Kroop*, 34 M.J. 628 (A.F.C.M.R. 1992), *aff'd*, 38 M.J. 470 (C.M.A. 1993) as support for his claim that to be valid the specification must allege a violation of a regulation or custom of the service. The government charged that Lt Colonel Kroop did "wrongfully behave with undue familiarity, wrongfully engage in excessive social contacts, and wrongfully have sexual intercourse with" a married female lieutenant under his command, "which conduct, under the circumstances, was unbecoming an officer and a gentleman."

The Air Force Court of Military Review found that the allegations of behaving with "undue familiarity" and engaging in "excessive social contacts" were akin to fraternization, and "absent a special regulatory prohibition, fraternization is only an offense in the military when it involves relations between an officer and an enlisted person that violate a custom of the service." *Id.* 34 M.J. at 634. The Court stated that without a regulation or a long-standing custom against such familiarity and social contacts, the accused would not have adequate notice that his conduct was criminal. *Id.* (citing *Levy*, 417 U.S. at 755). Finding no such Air Force regulation, the Court noted the difficulty in defining a custom because of the vagueness of the terms "undue familiarity" and "excessive social contacts." The Court held the specification failed to state an offense, except as it alleged adultery.

The Court of Military Appeals affirmed in a splintered opinion. Senior Judge Everett and Judge Wiss opined that the allegations would not state an offense absent an Air Force custom or regulation to the contrary. Chief Judge Sullivan concurred in sustaining the conviction for adultery, but declined to comment further. Judge Gierke dissented. He would have held that the allegations of "undue familiarity" and "excessive social contacts" were sufficient to allege violations

of Article 133. Judge Cox agreed with Judge Gierke's explanation of the law, but concurred in the result. Judge Cox read the Air Force court's decision, doubting that the particular conduct charged was of such a character as to rise to conduct unbecoming an officer, as an exercise of its fact-finding powers under Article 66(c), UCMJ. As such, the Court of Military Appeals was without authority to reverse. *Kroop*, 38 M.J. at 473 (Cox, J., concurring in the result).

"Despite the high standards of accountability to which an officer is held, it still is necessary that, through custom, regulation, or otherwise, he be given notice that his conduct is unbecoming." *United States v Guaglione*, 27 M.J. 268, 272 (C.M.A. 1988). But, unlike Kroop, this accused was not charged with some vague and undefined crime. He was charged with developing an "unprofessional relationship" with a subordinate. At the time of the offense, the term "unprofessional relationships" was defined by a general regulation, Air Force Instruction (AFI) 36-2909, *Fraternization and Professional Relationships* (20 Feb 95). That regulation required that all members of the Air Force "must respect authority and maintain military customs and courtesies, which include avoiding unprofessional relationships." *Id.* at ¶ 1. It further required that Air Force personnel "be aware of the guidelines" contained therein, and "conduct their official and personal relationships accordingly." *Id.* at ¶ 1.1. The instruction defines the term "unprofessional relationships" as "[p]ersonal relationships between officers, between enlisted members, and between officers and enlisted members (fraternization) which result in inappropriate familiarity or create the appearance of favoritism, preferential treatment, or impropriety." *Id.* at ¶ A1.1.3.

The instruction further explains the concept:

> Professional relationships are essential to the effective operation of the Air Force, but unprofessional relationships create the

> appearance that personal friendships and preferences are more important than individual performance and contribution to the mission. Because they erode morale, discipline, and the unit's ability to perform its mission, they become matters of official concern.

*Id.* at ¶ A1.2.1. Dating can cause the appearance of favoritism or partiality and affect the morale, discipline, or mission accomplishment of the organization. *Id.* at ¶ A1.3.1 and A1.3.2. The instruction made the senior member primarily responsible for maintaining any relationship on a professional basis. *Id.* at ¶ 1.2. Although AFI 36-2909 does not appear to be punitive, it provides notice to military members of the meaning of the term "unprofessional relationship" and the possibility of punitive action for conducting such a relationship. *See id.* at ¶ 2.2.

The accused further argues that the prosecution was required to allege in the specification every act it intended to prove to establish the unprofessional relationship. He claims that two-thirds of the members had to agree that he committed a particular act before any member could consider it to support a conviction.

The accused was charged with a course of conduct offense—that he did wrongfully and willfully develop an unprofessional relationship of inappropriate familiarity with Lt Clemm, a subordinate under his command. The prosecution was not trying to allege that the accused committed an offense by going with Lt Clemm to the gym to exercise or to a restaurant to eat dinner. Indeed, such acts could be perfectly legal. By charging the accused with conduct unbecoming an officer, the prosecution was alleging that, taken as a whole, the accused's relationship with Lt Clemm was unprofessional and criminal because it "[fell] below the standards established for officers." *United States v. Taylor*, 23 M.J. 314, 318 (C.M.A. 1987). The acts which the accused claimed were missing from the

specification were merely evidence the prosecution believed established an unprofessional and inappropriate relationship. As such, they did not amount to elements of the offense, and there was no need for the prosecution to allege them in the specification or any requirement that the members vote on them. There is no requirement that the specification plead all of the evidence that will support the accused's conviction. That is the purpose of discovery and the bill of particulars, both of which were provided to this accused. *See* R.C.M. 906(b)(6), Discussion ("The purposes of a bill of particulars are to inform the accused of the nature of the charge with sufficient precision to enable the accused to prepare for trial, to avoid or minimize the danger of surprise at the time of trial, and to enable the accused to plead the acquittal or conviction in bar of another prosecution for the same offense when the specification itself is too vague and indefinite for such purposes"). *See also* Francis A. Gilligan and Fredric I. Lederer, *Court-Martial Procedure* § 6-12.00 (1991).

We have no doubt that the express terms of Article 133, the explanations of the offense contained in the *Manual for Courts-Martial*, the provisions of AFI 36-2909, and the expressions of his subordinates to him that the relationship was inappropriate (see Part III.A.) provided adequate notice to the accused that his conduct was criminal. Furthermore, the specification alleged an offense and adequately notified the accused of the charge against which he had to defend, and the elements of that offense.

## II. Disorderly Conduct

The accused was convicted of being disorderly in a public place, a violation of Article 134, UCMJ, in that, on divers occasions, in Pordenone, Italy, he "willfully walked on top of parked automobiles belonging to others, which conduct was of a nature to bring discredit upon the armed forces." In response to the staff judge advocate's recommendation, the accused claimed that he could not be convicted of service discrediting

conduct because there was no proof the public was aware of his behavior or his military status. *United States v Green*, 39 M.J. 606, 609 (A.C.M.R. 1994). *But see United States v Love*, 16 C.M.R. 228 (C.M.A. 1954) (holding drunkenness may be service-discrediting whether or not it occurs in public). *See also United States v Guerrero*, 33 M.J. 295, 298 (C.M.A. 1991) (if conduct not per se service-discrediting, then must examine the (1) time, (2) place, (3) circumstances, and (4) purpose, of the accused's conduct). *Cf. United States v Carr*, 28 M.J. 661 (N.M.C.M.R. 1989) (holding an act of sexual intercourse is "'open and notorious' (and hence criminal) when it is performed in such a place and under such circumstances that it is *reasonably likely to be seen by others*") (emphasis added). The convening authority, upon the recommendation of his staff judge advocate, approved the conviction of the lesser-included offense of conduct prejudicial to good order and discipline.

The accused asserts that the convening authority's action in approving a finding of guilty to conduct prejudicial to good order and discipline was unlawful because the court members never found him guilty of that element. In effect, he is arguing that a disorder to the prejudice of good order and discipline is not a lesser-included offense of a service discrediting disorder.

The military judge instructed the court members that the offense of service discrediting disorderly conduct has two elements—that the accused committed the act alleged and that, under the circumstances, the conduct was service-discrediting. The military judge also told the members that if they found the accused not guilty of a service-discrediting disorder, they should consider the lesser-included offense of a disorder to the prejudice of good order and discipline. The military judge instructed the members that the elements of this offense were that the accused committed the conduct alleged and that, under the circumstances, the conduct was prejudicial to good order and discipline.

In acting on the findings of a court-martial, the convening authority may change a finding of guilty to an offense that is a lesser-included offense of the offense of which the accused was convicted. Article 60(c)(3)(B), 10 U.S.C. § 860(c)(3)(B). "A lesser offense is included in a charged offense when the specification contains allegations which either expressly or by fair implication put the accused on notice to be prepared to defend against it in addition to the offense specifically charged." *MCM*, Part IV, ¶ 3b(1).

In determining if one offense is a lesser-included offense of another, we must examine the statutory elements as well as the pleadings. *United States v Weymouth*, 43 M.J. 329, 340 (1995). Conduct prejudicial to good order and discipline is a characteristic of all offenses under the Uniform Code of Military Justice, and it is presumed in all specifically enumerated offenses. *United States v Foster*, 40 M.J. 140, 143 (C.M.A. 1994) (citing *United States v Doss*, 15 M.J. 409, 415 (C.M.A. 1983) (Cook, J., concurring in the result)). While service-discrediting disorderly conduct is not an enumerated offense, we are convinced the same rule applies—the prejudice to good order and discipline element is presumed in service-discrediting conduct. Alleging a disorder as service-discrediting merely enhances the maximum period of confinement which may be imposed. Therefore, disorderly conduct to the prejudice of good order and discipline is a lesser-included offense of disorderly conduct of a nature to bring discredit upon the armed forces. The convening authority's action was a lawful exercise of his discretion.

## III. Legal Sufficiency

The accused asserts that the evidence presented at trial was legally insufficient to sustain either of his convictions. The test for legal sufficiency is "whether, considering the evidence in the light most favorable to the prosecution, a reasonable fact-finder could have found all the essential elements beyond a reasonable doubt." *United States v Turner*, 25 M.J. 324 (C.M.A.

1987) (citing *Jackson v Virginia*, 443 U.S. 307, 319 (1979)). We will "draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v Blocker*, 32 M.J. 281 (C.M.A. 1991).

*A. Conduct Unbecoming an Officer*

There are two elements to the offense of conduct unbecoming an officer: (1) that between on or about 20 November 1995 and 18 December 1995, at or near Pordenone, Italy, the accused did wrongfully and willfully develop an unprofessional relationship of inappropriate familiarity with First Lieutenant Julie Clemm, a subordinate under his command; and (2) that under the circumstances, the accused's conduct was unbecoming an officer and a gentleman. The military judge broke the first element into two, but it does not affect our decision. Conduct unbecoming an officer and a gentleman includes "action or behavior in an unofficial or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer." *MCM*, Part IV, ¶ 59c(2).

The accused was the commander of a fighter squadron deployed from Elmendorf Air Force Base (AFB), Alaska, to Aviano Air Base (AB), Italy. Lt Clemm was assigned to the accused's squadron as an intelligence officer and was also deployed to Aviano AB.

The squadron held a Thanksgiving party at the hotel in which the enlisted members of the squadron were staying. After dinner, Lt Clemm went behind the bar and started mixing drinks. She was very intoxicated and several of the enlisted members appeared to be disgusted by her behavior. Captain Lovrak, the squadron section commander, saw Lt Clemm press back against Major Cloutier, the operations officer, turn, and put her hands on his chest, while he tried to avoid her. Major Cloutier saw the accused and Lt Clemm behind the bar together, standing close together. Major Cloutier became uncomfortable because of the enlisted

personnel who were in attendance. Some of the enlisted members discussed with Major Moore their concerns with Lt Clemm's behavior.

Shortly thereafter, the accused and Lt Clemm went to a squadron bonfire on the beach below the hotel. At least three officers in the squadron observed the accused place his arm around Lt Clemm, while standing with his hip touching hers. The officers became concerned about the appearance of impropriety. Captain Hughes pulled the accused away from Lt Clemm, with some difficulty, on a pretext of discussing air operations. At the end of the discussion, Captain Hughes warned the accused to stay away from Lt Clemm because of the appearance of impropriety. The accused and Captain Hughes returned to the bonfire. Major Durtschi, another member of the squadron, observed the accused return to the bonfire, stand very close to Lt Clemm, and again put his arm around her.

When the group departed the beach to return to their hotel, the accused and Lt Clemm started to get into the back seat of a vehicle together. Captain Lange, concerned about the behavior on the beach, tried to sit between them, but was shunted to another vehicle. During the ride back to the hotel, the accused placed his hand on top of Lt Clemm's hand. The next day the accused apologized for touching her or being forward with her.

When the group arrived back at the hotel, Captain Hughes rode up the elevator with the accused and warned him about going to see Lt Clemm. The accused responded, "Yeah, but she would look really good with my dick in her mouth." When the accused got back to his room, he called Lt Clemm. She was in Major Cloutier's room (across the hall from her room) when the phone rang. She told him there was a party going on in Major Cloutier's room and that he should come downstairs (the accused lived on a higher floor). Approximately five minutes later, the accused arrived with two glasses and a bottle

of wine. He sat close to Lt Clemm and shared the wine exclusively with her. The accused and Lt Clemm left the party within minutes of each other.

Several officers in the squadron believed the accused and Lt Clemm spent an inordinate amount of time together. They seemed to travel back and forth between the hotel and the squadron together on a regular basis. They went to the gym and ate at restaurants together.

Lt Clemm signed up to go on a trip to Rome. The accused was scheduled to go to Rome the same weekend, but not as part of the tour. Both Lt Clemm and the accused cancelled their trips. During that weekend, the accused had two telephone conversations with Captain Hume, in which he said he was up in the mountains with a beautiful woman. Lt Clemm was not seen all weekend, but claimed to have stayed in her room. Major Cloutier knocked on Lt Clemm's door on Saturday night and Sunday morning, but did not get a response.

After the accused's impromptu promotion party, at approximately 0300, Major Grahn, another member of the squadron, confronted the accused about the appearance that he was having an inappropriate relationship with Lt Clemm. The accused did not deny it. During their conversation, Lt Clemm telephoned the accused.

As Captain Lovrak explained, the accused was familiar with his responsibilities as a leader.

> He discussed how one's—the perceptions of other people of our personal conduct, can affect a leader's effectiveness or ineffectiveness, stating specifically that when a leader is seen or even perceived to fail morally, then that leader has indeed failed, because perception is reality in this business. And that when confronted on perceptions regarding one's personal conduct, it

> is that leader's responsibility to change that perception by changing the conduct, regardless of the validity or invalidity of the actions driving those perceptions.

The accused told Captain Lovrak that his wife had planned to meet him in Hawaii for a romantic rendezvous before he returned to Elmendorf AFB. During the planning for the return, the accused told Captain Lovrak that he didn't want to go. Although he missed his wife and child, he was having too much fun.

On the flight back to Elmendorf AFB after he was relieved of command, the accused told Major Moore that Lt Clemm had had affairs in the past, including one with Major Cloutier. He said that "he didn't know how deep he and [his wife] would have to go to right this or to—how deep he would have to dig into the squadron affairs." He also said that "this may be 'me and Julie against the whole Air Force by the time it's all over,'" and the results would be "earth-shattering."

Several subordinate officers warned the accused of the perception that he was carrying on an affair with Lt Clemm. The accused took no action to change his behavior or alleviate the concerns of his subordinates.

Considering the evidence in the light most favorable to the prosecution and drawing every reasonable inference in favor of the prosecution, we are convinced that a reasonable fact-finder could have found, beyond a reasonable doubt, that the accused did wrongfully and willfully develop an unprofessional relationship with Lt Clemm which, under the circumstances, was unbecoming an officer and a gentleman because it fell below the standards established for Air Force officers.

In reaching this conclusion, we considered the issue invited by The Judge Advocate General: Does the offense of engaging in an unprofessional relationship with another officer require proof of a custom of the service or a violation of a regulation

prohibiting such conduct? It does not. The prosecution is required to prove beyond a reasonable doubt each and every element of the offense charged. As noted earlier, the existence of a custom or regulation prohibiting the accused's conduct is not an element of the offense. Article 133 was not meant to be so restrictive. The gravamen of an offense under Article 133, is not that the conduct violates a custom of the service or a regulation, but that, as a whole, it falls below the level of conduct we expect of our officers. *MCM*, Part IV, ¶ 59c(2). A regulation or custom would be admissible to show that his conduct fell below the appropriate level, but would not be necessary. It is for the members to determine, under all the circumstances of the case, whether the accused's conduct fell below the acceptable level.

B. Disorderly Conduct

There are two elements to the offense of disorderly conduct: (1) that the accused was disorderly by walking on cars; and (2) that, under the circumstances, the accused's conduct was prejudicial to good order and discipline. *See MCM*, Part IV, ¶ 73b. The definition of disorderly conduct includes, "conduct of such a nature as to affect the peace and quiet of persons who *may* witness it and who *may* be disturbed or provoked to resentment thereby." *MCM*, Part IV, ¶ 73c(2) (emphasis added). To be prejudicial to good order and discipline, the conduct must be prejudicial in a reasonably direct and palpable manner. *Id.* at ¶ 60c(2)(a).

The evidence established that on more than one occasion, in the city streets of Pordenone, Italy, the accused walked on the cars of others that were parked along the street. On each of these occasions he did so in the presence of subordinates under his command. On the last occasion, which occurred after an impromptu promotion party, the accused had to be restrained by an officer under his command who observed damage to the vehicles. Considering the evidence in the light most favorable to the prosecution and drawing every

reasonable inference in favor of the prosecution, we are convinced that a reasonable fact-finder could have found, beyond a reasonable doubt, that the accused was disorderly and that his conduct was prejudicial to good order and discipline in a direct and palpable manner.

## IV. Government Misconduct

In his last assignment of error, the accused alleges that government misconduct so permeated his court-martial as to deny him due process of law. He provides a laundry list of abuses, some of which were resolved by the government prior to trial, some were resolved by the military judge at trial, others were never raised at trial despite the opportunity to do so, and several focus on the government's treatment of Lt Clemm, for which the accused admits he had no standing to contest. After examining these issues, we are convinced that the accused has failed to carry his burden of establishing that the government's conduct was outrageous or that he was prejudiced by it.

## V. Conclusion

Finding no error of law, the findings and sentence are

AFFIRMED.

Judge SPISAK and Judge SCHLEGEL concur.

## Appendix C

Department of the Air Force
United States Air Force Trial Judiciary
In the Western Circuit

| | |
|---|---|
| United States | ) |
| | ) |
| | ) Government Response to |
| | ) Defense Motion to Dismiss |
| SHELLY S. ROGERS | ) For Failure to State an |
| 90th Fighter Squadron | ) Offense |
| Elmendorf AFB, AK | ) |
| FR 493-64-5833 | ) |

Bill of Particulars

The following is a Bill of Particulars in response to the motion for dismissal of Charge II and its specification clarifying what is meant by developing an unprofessional relationship of inappropriate familiarity with First Lieutenant Julie Clemm, a subordinate under his command.

1. Testimony surrounding the 21 November 1995 Thanksgiving party in Caorle, Italy. This includes the ride back to Pordenone, Italy, statements made by the accused in the elevator to Captain Hughes and the subsequent gathering in Major Cloutier's hotel room.

2. Observations in November and December 1995 from members of the squadron concerning frequency of off-duty contacts between the accused and his subordinate Intelligence Officer, 1Lt [First Lieutenant] Clemm.

3. Testimony that the accused and 1Lt Clemm spoke to each other on the telephone from their respective hotel rooms in the middle of night on more than one occasion.

4. Lt Clemm's statements to Major Cloutier admitting to having an affair with the accused and her inability to stop the affair.

5. Testimony from various squadron personnel concerning their perceptions of the accused and 1Lt Clemm as they pertain to confrontations with the accused and his reactions to their confrontations.

6. Statements that 1Lt Clemm made to Captain Lovrak that "you warned me about [other aircrew] but you didn't warn me about Lt Col Rogers."

7. Statements made by the accused to Major Cloutier concerning the "dice poker chip."

8. Statements by the accused while on his cellular phone to Major Hume that he was in [the] mountains with a beautiful woman, and a statement to Major Cloutier that "we" are in the mountains.

9. Major Durtchi's observations of the accused and 1Lt Clemm riding in a car together on a non-duty day in civilian clothes.

10. Failure of the accused to advise 1Lt Clemm to have her room changed again when he discovered that she had moved into the room next to his.

s/GREGORY E. PAVLIK, Major, USAF 10 Sep 96
Trial Counsel

s/MARK T. ALLISON, Capt, USAF 10 Sep 96
Assistant Trial Counsel

## Appendix D

**By Order of the Secretary of the Air Force**

**Air Force Instruction 36-2909**
**20 February 1995**
**Personnel**

**FRATERNIZATION AND PROFESSIONAL RELATIONSHIPS**

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This instruction identifies commander, supervisor and personal responsibilities for maintaining professional relationships between Air Force members of different grades or positions, as well as between Air Force members and members of other uniformed services. Unprofessional relationships, including fraternization, harm good order, discipline, respect for authority, unit cohesion, and mission accomplishment. The guidance set forth in this instruction is based on the custom against fraternization that has been a part of, and enforced within, the American military for more than 200 years. This instruction applies to active duty, Air Force Reserve and Air National Guard members and implements Air Force Policy Directive 36-29, *Military Standards*.

### SUMMARY OF REVISIONS

This revision of Air Force Instruction (AFI) 36-2909 revises paragraph A1.3.2 and deletes paragraph A1.3.3 to more clearly prohibit officer and enlisted dating as well as shared activities. A * indicates revision from the previous edition.

**Supersedes:** AFI 36-2909, 6 May 1994
**OPR:** HQ AFMPC/JA Lt Col Kenneth A. Dekat
**Certified by:** HQ AFMPC/JA Col Allen B. Hoppe
**Distribution:** F
**Number of Pages:** 2

**Body:**

1. What Members Must Do.

2. What Commanders and Supervisors Must Do.

**Attachment 1:** Guidelines—Fraternization and Professional Relationships

**A1.1. Terms Explained.**

**A1.2. General Discussion.**

**A1.3. Specific Situations.**

**A1.4. Other Relationships.**

**1. What Members Must Do.** All members must respect authority and maintain military customs and courtesies, which include avoiding unprofessional relationships.

1.1. Members will be aware of the guidance in attachment 1 and conduct their official and personal relationships accordingly.

1.2. The senior member in a relationship is primarily responsible for maintaining the professionalism of that relationship.

**2. What Commanders and Supervisors Must Do.** Commanders and supervisors will use their authority to maintain good order and discipline within their units. If good professional judgment and common sense indicate that a relationship is causing, or may reasonably result in, damage to morale, good order, discipline, unit cohesion or mission accomplishment, take corrective action.

2.1. Consider administrative actions including counseling (an appropriate first step), reprimanding, removing, demoting or processing people for administrative separation. Adverse comments in performance reports are also corrective tools.

2.2. Consider punitive action, when appropriate, especially for favoritism, partiality, or misuse of grade or position which may be violations of the Uniform Code of Military Justice (UCMJ). Fraternization is a violation of the UCMJ.

BILLY J. BOLES, Lt General, USAF
DCS/Personnel

**Attachment 1**

## GUIDELINES—FRATERNIZATION AND PROFESSIONAL RELATIONSHIPS

### A1.1. Terms Explained.

A1.1.1. Professional Relationships. Association and communication between members of all grades regarding careers, performance, unit mission and effectiveness, workplace improvements, and a wide range of similar subjects. Participation by members of all grades in organizational activities, base intermural, interservice and intraservice athletic competitions, unit-sponsored events, religious activities, community welfare projects and youth programs.

A1.1.2. Unprofessional Relationships. Personal relationships between officers, between enlisted members, and between officers and enlisted members (fraternization) which result in inappropriate familiarity or create the appearance of favoritism, preferential treatment, or impropriety.

A1.1.3. Fraternization. Personal relationships between officers and enlisted members in violation of customary bounds of acceptable behavior in the Air Force which prejudice good order and discipline or discredit the armed services. Criminal charges can be brought under the UCMJ. See Manual for Courts-Martial, 1984, Part IV, paragraph 83.

**A1.2. General Discussion.**

A1.2.1. Professional relationships are essential to the effective operation of the Air Force, but unprofessional relationships can develop between officers, between enlisted members, and between officers and enlisted members. Such relationships create the appearance that personal friendships and preferences are more important than individual performance and contribution to the mission. Because they erode morale, discipline, and the unit's ability to perform its mission, they become matters of official concern.

**A1.3. Specific situations**. Any relationship that harms your unit's morale, discipline or efficiency requires action, but here are some personal relationships that cause particular problems.

A1.3.1. Relationships in the Same Chain of Command, the Same Unit, or a Closely Related Unit. Personal relationships between members of different grades or positions within an organization or chain of command can easily become unprofessional. Dating and indebtedness commonly get out of hand because they appear to create favoritism or partiality. Consequently, senior members should not date or become personally obligated or indebted to junior members. This is also because seniors have, or are perceived to have, authority to influence the junior member's career.

*A1.3.2. Dating, Courtships, Close Friendships, and Shared Activities. These are subject to the same policy considerations as other relationships. Like any relationship, they become a matter of official concern when they adversely affect morale, discipline or mission accomplishment. Members entering into these relationships must consider the potential impact of their relationship on the organization. It follows that officers do not date enlisted members. It also follows that officers do not share their off base living quarters, personal vacations, or take weekend trips with enlisted members of either sex.

**A1.4. Other Relationships.** Officers should not make a habit of spending off duty time with enlisted personnel, regardless of gender or the nature of their relationship. Examples include social gatherings, gambling or attending nightclubs, bars or theaters on a personal, social basis with enlisted members. The same applies to senior enlisted people in relating to junior enlisted members. In addition, unprofessional relationships can develop between members of different services, particularly in joint service assignments.

## Appendix E

**By Order of the Secretary of the Air Force**

**Air Force Instruction 36-2909**
**1 May 1996**
**Personnel**

**PROFESSIONAL AND UNPROFESSIONAL RELATIONSHIPS**

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This instruction identifies command, supervisory and personal responsibilities for maintaining professional relationships between Air Force members, between Air Force members and the Air Force and Department of Defense civilian employee work force, and between Air Force members and members of other uniformed services. Unprofessional relationships, especially fraternization, erode good order, discipline, respect for authority, unit cohesion, and, ultimately, mission accomplishment. It is the responsibility of commanders and supervisors at all levels to ensure compliance with this instruction. This instruction applies to all active duty, members of the United States Air Force Reserve (USAFR), and members of the Air National Guard (ANG). Officers, including Reserve officers on active duty or inactive duty for training and ANG officers in federal service, who violate the custom of the service against fraternization or the specific prohibitions contained in paragraph 5 and all of its subparagraphs can be prosecuted under either Article 92 or Article 134 of the Uniform Code of Military Justice (UCMJ), or both, as well as any other applicable article of the UCMJ, when appropriate.

### SUMMARY OF REVISIONS

This instruction has been revised throughout. Major revisions follow: provides additional guidance on activities and situations that lead to or constitute unprofessional

relationships, including fraternization; prohibits officers from engaging in specific relationships with enlisted members; subjects officers who violate the specific prohibitions to disciplinary action under the UCMJ; provides expanded guidance on administrative actions which may be initiated as a result of unprofessional relationships; extends the instruction to cover relationships between military members and civilian employees; stresses personal accountability for maintaining and enforcing professional relationships; and requires commanders and supervisors to act expeditiously in addressing all forms of unprofessional relationships.

**1. General.** Professional relationships are essential to the effective operation of all organizations, both military and civilian, but the nature of the military mission requires absolute confidence in command and an unhesitating adherence to orders that may result in inconvenience, hardships or, at times, injury or death. This distinction makes the maintenance of professional relationships in the military more critical than in civilian organizations. While personal relationships between Air Force members are normally matters of individual choice and judgment, they become matters of official concern when they adversely affect the Air Force. This guidance focuses on the impact of personal relationships on the interests of the Air Force as an institution. The guidance set forth in this instruction is based, in part, on the custom against fraternization that has been a part of and enforced within the American military for over 200 years.

**2. Guidance.**

2.1. Professional Relationships. Professional relationships are those that contribute to the effective operation of the Air Force. The Air Force encourages personnel to communicate freely with their superiors regarding their careers, performance, duties and missions. This type of communication enhances morale and discipline and improves the operational environment while preserving proper respect for authority and

appropriate mission focus. Participation by members of all grades in organizational activities, unit sponsored events, intramural sports, chapel activities, community welfare projects, youth programs and the like, enhances morale and contributes to unit cohesion.

2.2. Unprofessional Relationships. Relationships are unprofessional, whether pursued on or off-duty, when they detract from the authority of superiors or result in, or reasonably create the appearance of, favoritism, misuse of office or position, or the abandonment of organizational goals for personal interests. Unprofessional relationships can exist between officers, between enlisted members, between officers and enlisted members, and between military personnel and members of the civilian employee work force. Fraternization is an aggravated form of unprofessional relationship and is recognized as a violation of Article 134 of the UCMJ.

2.2.1. Fraternization. Fraternization is a personal relationship between an officer and an enlisted member which violates the customary bounds of acceptable behavior in the Air Force and prejudices good order and discipline, discredits the armed services, or operates to the personal disgrace or dishonor of the officer involved. The custom recognizes that officers will not form personal relationships with enlisted members on terms of military equality, whether on or off-duty. Although the custom originated in an all male military, it is gender neutral. Fraternization can occur between males, between females and between males and females. Because of the potential damage fraternization can do to good order, discipline, morale, and unit cohesion, the President specifically provided for the offense of fraternization under the UCMJ. Consequently, disciplinary action can be initiated under the UCMJ against an officer for fraternization. (See Manual for Courts-Martial, 1984, Part IV, Paragraphs 59 and 83 for a complete discussion of fraternization and the related offense of conduct unbecoming an officer.)

**3. General Guidelines for all Military Personnel for Avoiding Unprofessional Relationships, Including Fraternization.** Military experience has shown that certain kinds of personal relationships present a high risk for being or developing into unprofessional relationships. Unprofessional relationships negatively impact morale and discipline. While some personal relationships are not in and of themselves unprofessional, they may be or become unprofessional when other facts or circumstances are taken into consideration. For example, factors which can change an otherwise permissible relationship into an unprofessional relationship include the members' relative positions in the organization, and the members' relative positions in the supervisory and command chains. Air Force members, both officer and enlisted, must be sensitive to the formation of those relationships and consider the probable impact of their actions on the Air Force in making their decisions. The rules regarding these relationships must be somewhat elastic to accommodate differing conditions; however, the underlying standard is that Air Force members are expected to avoid those relationships that negatively affect morale and discipline. Where economic constraints or operational requirements place officers and enlisted members and members of different grades in close proximity with one another (such as combined or joint clubs, joint recreational facilities or mixed officer/enlisted housing areas) military members are, nevertheless, expected to maintain professional relationships. The mere fact that maintaining professional relationships may be more difficult under certain circumstances does not excuse a member's responsibility to maintain Air Force standards.

3.1. Relationships Within an Organization. Unduly familiar relationships between members in which one member exercises supervisory or command authority over the other can easily be or become unprofessional. Similarly, as differences in grades increase, even in the absence of a command or supervisory relationship, there may be more risk that the

relationship will be, or be perceived to be unprofessional because senior members in military organizations normally exercise authority or some direct or indirect organizational influence over more junior members. The danger for abuse of authority is always present. The ability of the senior member to influence, directly or indirectly, assignments, promotion recommendations, duties, awards, and other privileges and benefits, places both the senior member and the junior member in a vulnerable position. Once established, such relationships do not go unnoticed by other members of a unit. Unprofessional relationships, including fraternization, between members of different services, particularly in joint service operations, may have the same impact on morale and discipline as if the members were assigned to the same service and should be avoided.

3.2. Relationships With Civilian Employees. Civilians are an integral part of the Air Force. They contribute directly to readiness and mission accomplishment. Consequently, military supervisors of all grades must maintain professional relationships with civilian employees. Unprofessional relationships with civilian employees, particularly those whom they supervise can have an adverse affect on morale, discipline and respect for authority.

3.3. Dating and Close Friendships. Dating, courtship, and close friendships between men and women are subject to the same policy considerations as are other relationships. Like any personal relationship, they become a matter of official concern when they adversely affect morale, discipline, unit cohesion, respect for authority, or mission accomplishment. Members must recognize that these relationships can adversely affect morale and discipline even when the members are not in the same chain of command or unit. The formation of these relationships between superiors and subordinates within the same chain of command or supervision invariably raises the perception of favoritism or misuse of position and impacts morale and discipline negatively.

3.4. Shared Activities. Sharing living accommodations, vacations, transportation, and off-duty interests on a frequent or recurring basis can be, or can reasonably be perceived to be, unprofessional. These types of arrangements often lead to claims of abuse of position or favoritism. It is often the frequency of these activities or the absence of any official purpose or organizational benefit which causes them to become, or to be perceived to be, unprofessional. While an occasional round of golf, game of racquetball or similar activity between a supervisor and a subordinate could remain professional, daily or weekly activities could result in at least the perception of an unprofessional relationship. Similarly, while it might be appropriate for a first sergeant to play golf with a different group of officers from his organization each weekend, in order to get to know them better, playing with the same officers every weekend might be, or be perceived to be unprofessional.

3.5. Training, Schools and Professional Military Education. Personal relationships between students and instructors or staff in the training and school environment present particular risks and are especially likely to result in abuse of position, partiality or favoritism by instructors or staff, or create the appearance of such. Consequently, additional, specially tailored rules may be needed in this environment. Commands providing these functions should, consistent with this instruction, publish supplemental directives to regulate personal relationships in the training and school environment.

3.6. Other Relationships. Other relationships, not specifically addressed above, can, depending on the circumstances, lead to actual or perceived favoritism or preferential treatment and must be avoided. Examples of activities which may result, depending on the circumstances in an adverse impact on morale, discipline and respect for authority are gambling, partying with subordinates, soliciting or making solicited sales to members junior in rank, grade or position (with specific

exceptions as set out in DoD 5500-7.R, Joint Ethics Regulation, paragraph 5-409), and joint business ventures.

**4. Consequences of Unprofessional Conduct.** All military members are subject to lawful orders. When a military member has been lawfully ordered to cease an unprofessional relationship or refrain from certain conduct, the military member is subject to prosecution under the UCMJ for violation of the order. Similarly, all military members are subject to prosecution for criminal offenses committed incidental to an unprofessional relationship (e.g. gambling, adultery, assault). In addition, officers may be prosecuted for violation of the specific prohibitions listed in paragraph 5 and all of its subparagraphs; violation of the custom against fraternization; and conduct unbecoming an officer.

**5. Specific Prohibitions Relating to Officers (Fraternization).** Unprofessional relationships between officers and enlisted members have a high potential for damaging morale and discipline and for compromising the standing of officers. Consequently, officers have an ethical and a legal obligation to avoid certain relationships and activities. Officers must not engage in any activity with an enlisted member that reasonably may prejudice good order and discipline, discredit the armed forces or compromise an officer's standing. The custom against fraternization in the Air Force extends beyond organizational and chain of command lines. In short, it extends to all officer/enlisted relationships.

5.1. Specific Prohibitions. Conduct which violates the custom of the Air Force against fraternization can be prosecuted under Article 134 of the UCMJ. In addition, with reasonable accommodation of married members and members related by blood or marriage, the following conduct is prohibited and can be prosecuted under either Article 92 of the UCMJ, Article 134, or both, and any other applicable article of the UCMJ when appropriate:

5.1.1. Officers will not gamble with enlisted members.

5.1.2. Officers will not borrow money from or otherwise become indebted to enlisted members.

5.1.3. Officers Will Not Engage in Sexual Relations With or Date Enlisted Members. Dating as set out here includes not only traditional, prearranged, social engagements between two members, but also includes more contemporary social activities which would reasonably be perceived to be a substitute for traditional dating.

5.1.3.1. Officer/Enlisted Marriages. Officer/enlisted marriages are not always the result of fraternization. Some are created by commissioning civilians married to enlisted members; others by commissioning an enlisted member married to another enlisted member. A small number of these marriages occur by operation of law following force reductions and nonselection for promotion of some officers with prior enlisted service. Consequently, the fact that an officer is married to an enlisted member is not, by itself, evidence of misconduct. When evidence of fraternization exists, however, the fact that the officer and enlisted member subsequently marry does not preclude appropriate command action based on the prior fraternization. Regardless of how the marriage came to be, married members are expected to respect all customs and courtesies observed by members of different grades when they are on duty or in uniform in public.

5.1.4. Officers Will Not Share Living Accommodations With Enlisted Members. This prohibition does not extend to situations where military operations reasonably require the sharing of living accommodations.

**6. Individual Responsibility To Maintain Professional Relationships.** All military members share the responsibility for maintaining professional relationships. However, the senior member (officer or enlisted) in a personal relationship bears primary responsibility for maintaining the professionalism of that relationship. Leadership requires the maturity and judgment to avoid relationships which undermine respect for

authority or which reasonably may impact negatively on morale, discipline, respect for authority, or the mission of the Air Force. This is especially true of officers and noncommissioned officers who are expected to exhibit the highest standards of professional conduct and to lead by example. The senior member in a relationship is in the best position to appreciate the effect of that particular relationship on an organization and in the best position to terminate or limit the extent of the relationship. Members should expect to be and must be held accountable for the impact of their conduct on the Air Force as an institution.

**7. Command and Supervisory Responsibilities.** Commanders and supervisors at all levels have the authority and the responsibility to maintain good order, discipline and morale within their units. They may be held accountable for failing to act in appropriate cases.

**8. Actions in Response to Unprofessional Relationships.** If good professional judgment and common sense indicate that a relationship is causing, or may reasonably result in, a degradation of morale, good order, or discipline, corrective action is required. Action should normally be the least severe necessary to correct the relationship, giving full consideration to the impact the relationship has had on the organization. Counseling, alone, or in conjunction with other options, may be an appropriate first step. Where a relationship continues in spite of counseling or other administrative action, an order to cease the relationship, or the offensive portion of the relationship, can and should be given. Officers or enlisted members who violate such orders are subject to action under the UCMJ for the violation of an order. Corrective action in different cases need not be identical, but should be measured in terms of the nature of the violation and the severity of its impact on morale, discipline, unit cohesion or the mission. Appearances of favoritism or partiality caused by inexperience or inadvertence are normally less serious than those resulting from a knowing disregard for policy or misuse of position or

office. Instances of actual favoritism, partiality, or misuse of grade or position may constitute violations of the UCMJ and, in appropriate cases, should result in punitive action. Relationships which have had an adverse impact on the Air Force should not be excused simply because the members subsequently marry or one of the members leaves the service. Where action under the UCMJ is determined not to be appropriate, the full spectrum of administrative actions is available. Administrative actions include, but are not limited to, counseling, reprimand, creation of an unfavorable information file, removal from position or assignment, demotion, delay or removal from a promotion list, adverse comment in performance reports and processing for administrative separation. One or more administrative actions may be appropriate.

**9. Training.** Instruction on the concepts of unprofessional relationships and fraternization shall be made a part of the curricula for basic training, commissioning programs, and professional military education for all military personnel. Commanders will familiarize themselves with this instruction and make certain all personnel are briefed on the concepts on an annual basis or more frequently as required.

**10. Questions Regarding This Instruction.** Military members who have questions as to the application or interpretation of this instruction should consult their commander. Commanders are encouraged to consult their servicing staff judge advocate for assistance in interpretation.

MICHAEL D. McGINTY, Lt General, USAF
DCS/Personnel

## Appendix F

**By Order of the Secretary of the Air Force**

**Air Force Instruction 36-2909**
**1 May 1999**
**Personnel**

**PROFESSIONAL AND UNPROFESSIONAL RELATIONSHIPS**

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This instruction establishes command, supervisory and personal responsibilities for maintaining professional relationships between Air Force members, between Air Force members and members of other uniformed services, between Air Force members and civilian employees of the Department of Defense, to include Air Force civilian employees, and between Air Force members and government contractor employees. Unprofessional relationships are those interpersonal relationships that erode good order, discipline, respect for authority, unit cohesion and, ultimately, mission accomplishment. It is the responsibility of commanders and supervisors at all levels to ensure compliance with this instruction. The policy set out in this instruction applies to all active duty members and to members of the United States Air Force Reserve (USAFR) and Air National Guard (ANG), except as provided in paragraph 3.8., below. Officers, including Reserve officers on active duty or inactive duty for training and ANG officers in Federal service, who violate the custom of the service against fraternization or the specific prohibitions contained in paragraph 5.1 of this instruction can be prosecuted under either Article 92 or Article 134 of the Uniform Code of Military Justice (UCMJ), or both, as well as any other applicable article of the UCMJ, as appropriate. This instruction implements Air Force Policy Directive (AFPD) 36-29, *Military Standards.*

*SUMMARY OF REVISIONS*

**This document is substantially revised and must be completely reviewed.**

This instruction has been revised to include specific prohibitions on the formation of personal relationships in the recruiting and training environments (paragraph 3.5.); to stress the use of a stepped approach to enforcement of the policy, taking into consideration all the surrounding facts and circumstances (paragraph 8.); and, to stress the prevention of unprofessional relationships through training and leadership by example (paragraph 9.).

**1. General.** Professional relationships are essential to the effective operation of all organizations, both military and civilian, but the nature of the military mission requires absolute confidence in command and an unhesitating adherence to orders that may result in inconvenience, hardships or, at times, injury or death. This distinction makes the maintenance of professional relationships in the military more critical than in civilian organizations. While personal relationships between Air Force members are normally matters of individual choice and judgment, they become matters of official concern when they adversely affect or have the reasonable potential to adversely affect the Air Force by eroding morale, good order, discipline, respect for authority, unit cohesion or mission accomplishment. Professional relationships are those interpersonal relationships consistent with Air Force core values: integrity first, service before self, and excellence in all we do. Military members understand that the needs of the institution will sometimes outweigh personal desires. This guidance focuses on the impact of personal relationships on the interests of the Air Force as an institution. The guidance set forth in this instruction is based, in part, on the custom against fraternization that has been a part of and enforced within the American military for over 200 years.

**2. Policy.**

**2.1. Professional Relationships.** Professional relationships are those that contribute to the effective operation of the Air Force. The Air Force encourages personnel to communicate freely with their superiors regarding their careers, performance, duties and missions. This type of communication enhances morale and discipline and improves the operational environment while, at the same time, preserving proper respect for authority and focus on the mission. Participation by members of all grades in organizational activities, unit-sponsored events, intramural sports, chapel activities, community welfare projects, youth programs and the like can enhance morale and contribute to unit cohesion.

**2.2. Unprofessional Relationships.** Relationships are unprofessional, whether pursued on or off-duty, when they detract from the authority of superiors or result in, or reasonably create the appearance of, favoritism, misuse of office or position, or the abandonment of organizational goals for personal interests. Unprofessional relationships can exist between officers, between enlisted members, between officers and enlisted members, and between military personnel and civilian employees or contractor personnel. Fraternization is one form of unprofessional relationship and is a recognized offense under Article 134 of the Uniform Code of Military Justice (UCMJ).

**2.2.1. Fraternization.** Fraternization, as defined by the Manual for Courts-Martial, is a personal relationship between an officer and an enlisted member that violates the customary bounds of acceptable behavior in the Air Force and prejudices good order and discipline, discredits the armed services, or operates to the personal disgrace or dishonor of the officer involved. The custom recognizes that officers will not form personal relationships with enlisted members on terms of military equality, whether on or off-duty. Although the custom originated in an all male military, it is gender neutral.

Fraternization can occur between males, between females and between males and females. Because of the potential damage fraternization can do to morale, good order, discipline, and unit cohesion, the President specifically provided for the offense of fraternization in the Manual for Courts-Martial. (See Manual for Courts-Martial, 1998 Edition, Part IV, paragraphs 59 and 83 for a discussion of fraternization and the related offense of conduct unbecoming an officer.)

**3. General Guidelines for All Military Personnel for Avoiding Unprofessional Relationships, Including Fraternization.** Military experience has shown that certain kinds of personal relationships present a high risk of becoming unprofessional. Personal relationships that are not initially unprofessional may become unprofessional when facts or circumstances change. For example, a close personal relationship between officers or between enlisted members can easily become unprofessional if one member becomes the commander, supervisor or rater of the other. Air Force members, both officer and enlisted, must be sensitive to the formation of these personal relationships, as well as the possibility that relationships that are not initially unprofessional may become so due to changed circumstances. The rules regarding personal relationships must be somewhat elastic to accommodate differing conditions and operational necessities; however, the underlying standard is that Air Force members are expected to avoid those relationships that negatively affect morale, discipline, respect for authority and unit cohesion. When economic constraints or operational requirements place senior and junior members in close proximity with one another (such as combined ranks or joint use clubs, joint recreational facilities or mixed officer/enlisted housing areas) military members are, nevertheless, expected to maintain professional relationships. The mere fact that maintaining professional relationships may be more difficult under certain circumstances does not relieve a member from the responsibility to maintain Air Force standards.

**3.1. Relationships Within an Organization.** Familiar relationships between members in which one member exercises supervisory or command authority over the other can easily be or become unprofessional. Similarly, differences in grade increase the risk that a relationship will be, or will be perceived to be unprofessional, because senior members in military organizations normally exercise authority or some direct or indirect organizational influence over the duties and careers of more junior members. The danger for abuse of authority is always present. The ability of the senior member to influence, directly or indirectly, assignments, promotion recommendations, duties, awards, and other privileges and benefits, places both the senior member and the junior member in vulnerable positions. Once established, such relationships do not go unnoticed by other members of a unit. Unprofessional relationships, including fraternization, between members of different services, particularly in joint service operations, can have the same impact on morale, discipline, respect for authority and unit cohesion, as if the members were assigned to the same service, and must be avoided.

**3.2. Relationships with Civilian Employees and Government Contractor Personnel.** Civilian employees and contractor personnel are an integral part of the Air Force. They contribute directly to readiness and mission accomplishment. Consequently, military members of all grades must maintain professional relationships with civilian employees and government contractor personnel, particularly those whom they supervise or direct, and must avoid relationships that adversely affect or reasonably can adversely affect morale, discipline and respect for authority or that violate law or regulation.

**3.3. Dating and Close Friendships.** Dating, courtship, and close friendships between men and women are subject to the same policy considerations as are other relationships. Like any personal relationship, they become matters of official concern when they adversely affect morale, discipline, unit cohesion,

respect for authority, or mission accomplishment. Members must recognize that these relationships can adversely affect morale and discipline, even when the members are not in the same chain of command or unit. The formation of such relationships between superiors and subordinates within the same chain of command or supervision is prohibited because such relationships invariably raise the perception of favoritism or misuse of position and erode morale, discipline and unit cohesion.

**3.4. Shared Activities.** Sharing living accommodations, vacations, transportation, and off-duty interests on a frequent or recurring basis can be, or can reasonably be perceived to be, unprofessional. These types of arrangements often lead to claims of abuse of position or favoritism. It is often the frequency of these activities or the absence of any official purpose or organizational benefit which causes them to become, or to be perceived to be, unprofessional. While an occasional round of golf, game of racquetball or similar activity between a supervisor and a subordinate could remain professional, daily or weekly activities could result at a minimum in the perception of an unprofessional relationship. Similarly, while it might be appropriate for a first sergeant to play golf with a different group of officers from his or her organization each weekend, in order to get to know them better, playing with the same officers every weekend might be, or reasonably be perceived to be, unprofessional.

**3.5. Recruiting, Training, Schools and Professional Military Education.** Personal relationships between recruiters and potential recruits during the recruiting process or between students and faculty or staff in training schools or professional military education (PME) settings are generally prohibited. These interpersonal relationships are especially susceptible to abuse of position, partiality or favoritism, or can easily create the appearance of such. This is particularly true during the recruiting process and in basic military training, because the potential recruit or junior military member is often unfamiliar

with Air Force standards and dependent on the senior member, and the senior member is in a position to directly affect, positively or negatively, the career of the junior member. Consequently, additional, specially tailored rules are needed in the recruiting and training environments.

**3.5.1. Recruiting.** The first impression of the Air Force that most military men and women form is through their contacts with a recruiter. This experience is a critical step in the development of Air Force members; it establishes expectations and begins the formation of Air Force core values. The relationship between recruiter and applicant must be completely professional. Consequently, recruiters will not form unprofessional personal relationships with applicants. At a minimum, recruiters will not date or carry on a social relationship with an applicant, or seek or engage in sexual activity with, or make sexual advances to, or accept sexual overtures from an applicant. In addition, recruiters will not use grade, position, threats, pressure or promises to attain or attempt to attain any personal benefit of any kind from an applicant. Recruiters will not gamble with, lend money to, borrow money from or become indebted to an applicant, or use personal resources to provide an applicant with lodging or transportation or any other benefit. The same limitations govern relationships between recruiters and an applicant's immediate family members.

**3.5.2. Basic Military Training and Initial Technical Training.** The integrity and leadership of the faculty and staff in basic military training and the initial technical training environment must not be permitted to be compromised by personal relationships with trainees. At a minimum, faculty and staff will not date or carry on a social relationship with a trainee, or seek or engage in sexual activity with, make sexual advances to, or accept sexual overtures from a trainee. In addition, faculty and staff will not use grade, position, threats, pressure or promises to attain or attempt to attain any personal benefit of any kind from a trainee, or share living quarters with,

gamble with, lend money to, borrow money from or become indebted to, or solicit donations (other than for Air Force approved campaigns) from a trainee. The same limitations govern personal relationships between faculty and staff and a trainee's immediate family members. Trainees have an independent obligation not to engage in these activities with members of the faculty and staff.

**3.5.3. Other Training and Education Setting.** The integrity and leadership of faculty and staff in all formal training and PME settings must not be compromised by personal relationships with trainees or students. At a minimum, faculty and staff will not date or carry on a social relationship with a trainee or student, or seek or engage in sexual activity with, make sexual advances to, or accept sexual overtures from a trainee or student. In addition, faculty and staff will not use grade, position, threats, pressure or promises to attain or attempt to attain any personal benefit of any kind from a trainee or student or members of a trainee or student's immediate family.

**3.5.4. Supplementation of this Instruction in the Recruiting, Training and Education Environments.** Commands providing recruiting, training and education functions may, consistent with this instruction, publish supplemental directives, to include punitive provisions, to regulate personal relationships in the recruiting, education, training, school and similar environments.

**3.6. Treatment, Care and Counseling.** Persons undergoing medical or psychological treatment or care, or receiving medical, psychological, pastoral, legal or other professional counseling may be dependent on, and therefore vulnerable to, those providing such services. Personnel providing treatment, care and counseling have a duty to refrain from using their position to gain any personal benefit from persons who are receiving their services. In particular, personnel providing such services will not seek or engage in sexual activity with, make

sexual advances to, or accept sexual overtures from persons who are receiving their services or the immediate family members of those receiving their services.

**3.7. Other Relationships.** Other relationships, not specifically addressed above, can, depending on the circumstances, lead to actual or perceived favoritism or preferential treatment and, if so, must be avoided. Examples of activities that may result in an adverse impact on morale, discipline and respect for authority are gambling or partying with subordinates, soliciting or making solicited sales to subordinates and entering into business ventures with members who are junior in rank, grade or position. (See DoD Directive 5500-7.R [the Joint Ethics Regulation], subsections 2-205 and 5-409 for guidance on solicitation and commercial activities), (set out in Attachment 1 to this instruction).

**3.8. Air Reserve Component (ARC) Personnel.** In applying the principles set out in this instruction to ARC personnel, when not performing active duty, full-time National Guard duty, or inactive duty training, commanders and supervisors should tailor the application and enforcement of the principles to appropriately address unique situations that may arise from part-time service.

**4. Relationship of Unprofessional Conduct to Other Provisions of the UCMJ.** All military members are subject to lawful orders. When a military member has been lawfully ordered to cease an unprofessional relationship or refrain from certain conduct, the military member is subject to prosecution under the UCMJ for violation of the order. Similarly, all military members are subject to prosecution for criminal offenses committed incidental to an unprofessional relationship (e.g., gambling, adultery, assault). In addition, officers may be prosecuted for violation of the specific prohibitions listed in paragraph 5.1, and its subparagraphs (below); violation of the custom against fraternization; and conduct unbecoming an officer.

**5. Specific Prohibitions Relating to Officers (Fraternization).** Unprofessional relationships between officers and enlisted members have a high potential for damaging morale and discipline and for compromising the standing of officers. Consequently, officers have an ethical and a legal obligation to avoid certain relationships and activities. Officers must not engage in any activity with an enlisted member that reasonably may prejudice good order and discipline, discredit the armed forces or compromise an officer's standing. The custom against fraternization in the Air Force extends beyond organizational and chain of command lines. In short, it extends to all officer/enlisted relationships.

**5.1. Specific Prohibitions.** Conduct that violates the custom of the Air Force against fraternization can be prosecuted under Article 134 of the UCMJ. In addition, with reasonable accommodation for married members and members related by blood or marriage, the following conduct is prohibited and can be prosecuted under either Article 92 of the UCMJ, Article 134, or both, and any other applicable article of the UCMJ when appropriate:

**5.1.1. Officers Will Not Gamble With Enlisted Members.**

**5.1.2. Officers Will Not Lend Money to, Borrow Money From or Otherwise Become Indebted to Enlisted Members.** exception: Infrequent, non-interest-bearing loans of small amounts to meet exigent circumstances.

**5.1.3. Officers Will Not Engage in Sexual Relations with or Date Enlisted Members.** Dating as set out here includes not only traditional, prearranged, social engagements between two members, but also includes more contemporary social activities that would reasonably be perceived to be a substitute for traditional dating.

**5.1.3.1. Officer/Enlisted Marriages.** When evidence of fraternization exists, the fact that an officer and enlisted member subsequently marry does not preclude appropriate

command action based on the prior fraternization. The fact that an officer is married to an enlisted member is not, by itself, evidence of misconduct. For example, some officer-enlisted marriages are created by the commissioning of civilians married to enlisted members, or by the commissioning of enlisted members married to other enlisted members. Other officer-enlisted marriages may result from force reductions and nonselection for promotion of some officers who then reverted to enlisted status. Regardless of how the officer-enlisted marriage came to be, married members are expected to respect all customs and courtesies observed by members of different grades when they are on duty, in uniform in public, or at official social functions.

5.1.4. Officers Will Not Share Living Accommodations with Enlisted Members Except When Reasonably Required by Military Operations.

5.1.5. Officers Will Not Engage, on a Personal Basis, in Business Enterprises with Enlisted Members, or Solicit or Make Solicited Sales to Enlisted Members, Except as Permitted by the Joint Ethics Regulation. For the application of this rule, members should consult DoD Directive 5500.7-R, the Joint Ethics Regulation, subsections 2-205 and 5-409, (set out in Attachment 1 to this instruction)

**6. Individual Responsibility To Maintain Professional Relationships.** All military members share the responsibility for maintaining professional relationships. However, the senior member (officer or enlisted) in a personal relationship bears primary responsibility for maintaining the professionalism of that relationship. Leadership requires the maturity and judgment to avoid relationships that undermine respect for authority or impact negatively on morale, discipline, respect for authority, or the mission of the Air Force. This is especially true of officers and noncommissioned officers who are expected to exhibit the highest standards of professional conduct and to lead by example. The senior member in a

relationship is in the best position to appreciate the effect of that particular relationship on an organization and in the best position to terminate or limit the extent of the relationship. However, all members should expect to be and must be held accountable for the impact of their conduct on the Air Force as an institution.

**7. Command and Supervisory Responsibilities.** Commanders and supervisors at all levels have the authority and the responsibility to maintain good order, discipline and morale within their units. They may be held accountable for failing to act in appropriate cases.

**8. Actions in Response to Unprofessional Relationships.** If a relationship is prohibited by this instruction or is causing (or if good professional judgment and common sense indicate that a relationship may reasonably result in) a degradation of morale, good order, discipline or unit cohesion, a commander or supervisor should take corrective action. Action should normally be the least severe necessary to terminate the unprofessional aspects of the relationship. The full spectrum of administrative actions is available and should be considered. Administrative actions include, but are not limited to, counseling, reprimand, creation of an unfavorable information file (UIF), removal from position, reassignment, demotion, delay of or removal from a promotion list, adverse or referral comments in performance reports and administrative separation. One or more complementary actions can be taken. Experience has shown that counseling is often an effective first step in curtailing unprofessional relationships. More serious cases may warrant administrative action or nonjudicial punishment. Referral of charges to a court-martial is not appropriate except in aggravated cases. An order to terminate a relationship, or the offensive portion of a relationship, can and should be given whenever it is apparent that lesser administrative action may not be effective. Officers or enlisted members who violate such orders are subject to action under the UCMJ for violation of the order. Instances of actual

favoritism, partiality, or misuse of grade or position may constitute independent violations of the UCMJ or the punitive provisions of the Joint Ethics Regulation.

**8.1. Responses To Cases Involving Dating or Sexual Relationships.** When unprofessional conduct includes evidence of a sexual relationship, the sexual relationship is but one factor to be considered in determining the adverse impact, if any, on the organization and, hence, an appropriate response. It is the impact or reasonably foreseeable consequences of the conduct on morale, discipline, good order, unit cohesion and mission accomplishment that determines its seriousness, not its characterization, even if the conduct could be characterized as adultery or some other potential offense. No fact, standing alone, necessarily warrants referral of charges to a court-martial. When a relationship has had an adverse impact on the Air Force, unprofessional conduct should not be excused simply because the parties to the unprofessional relationship subsequently marry or one of the parties leaves the service.

**9. Training.** Instruction on the concepts of unprofessional relationships and fraternization shall be made a part of the curricula for basic training, commissioning programs, and professional military education for all military personnel. Commanders, judge advocates and supervisors will familiarize themselves with this instruction (in particular paragraph 8.) and commanders will make certain all personnel are briefed on this policy on an annual basis or more frequently.

**10. Questions Regarding This Instruction.** Military members who have questions as to the application or interpretation of the policy should consult their commander. Commanders are encouraged to consult their staff judge advocates or servicing legal offices for assistance in interpretation.

WILLIAM A. MOORMAN, Maj General, USAF
The Judge Advocate General

## Attachment 1

## GLOSSARY OF REFERENCES AND SUPPORTING INFORMATION

***References***

DoD 5500.7-R subsection 2-205, *Limitation on Solicited Sales*. Excerpts from the Joint Ethics Regulation. A DoD employee shall not knowingly solicit or make solicited sales to DoD personnel who are junior in rank, grade or position, or to the family members of such personnel, on or off duty. In the absence of coercion or intimidation, this does not prohibit the sale or lease of a DoD employee's non-commercial personal or real property or commercial sales solicited and made in a retail establishment during off-duty employment. The posting of an advertisement in accordance with Federal Government building management policies does not constitute solicitation for purposes of this section.

DoD 5500.7-R subsection 5-409, *Commercial Dealings Involving DoD Employees*. Excerpts from the Joint Ethics Regulation. A DoD employee shall not knowingly solicit or make solicited sales to DoD personnel who are junior in rank, grade or position, or to the family members of such personnel, on or off duty. In the absence of coercion or intimidation, this does not prohibit the sale or lease of a DoD employee's non-commercial personal or real property or commercial sales solicited and made in a retail establishment during off-duty employment. The posting of an advertisement in accordance with Federal Government building management policies does not constitute solicitation for purposes of this subsection.

a. This prohibition includes the solicited sale of insurance, stocks, mutual funds, real estate, cosmetics, household supplies, vitamins, and other goods or services.

b. Both the act of soliciting and the act of selling as a result of soliciting are prohibited. In both cases, however, a solicitation

is necessary for a violation to occur. While the standard prohibits a senior from making a solicited sale to a junior or to the junior's family, sales made because a junior approaches the senior and requests the sale to be made are not prohibited, absent coercion or intimidation by the senior.

c. Personal commercial solicitations by the spouse or other household member of a DoD employee to those who are junior in rank, grade, or position to the DoD employee, may give rise to the appearance that the DoD employee himself is using his public office for personal gain. When a spouse or household member of a DoD employee engages in such activity, the supervisor of the DoD employee must consult an Ethics Counselor, and counsel the DoD employee that such activity should be avoided where it may (1) Cause actual or perceived partiality or unfairness; (2) Involve the actual or apparent use of rank or position for personal gain; or (3) Otherwise undermine discipline, morale, or authority.

***Abbreviations and Acronyms***

**AFI**—Air Force Instruction

**ANG**—Air National Guard

**ARC**—Air Reserve Component

**DoD**—Department of Defense

**DoDD**—Department of Defense Directive

**DoDI**—Department of Defense Instruction

**JER**—Joint Ethics Regulation

**UCMJ**—Uniform Code of Military Justice

**USAFR**—United States Air Force Reserve

## Professional and Unprofessional Relationships

On 1 May 1999, the revised AFI 36-2909, *Professional and Unprofessional Relationships*, went into effect. This revision was the result of a SECDEF memorandum directing the services to adopt uniform, clear and readily understandable policies regarding good order and discipline and professional relationships.

Included in the revised AFI is the requirement that all judge advocates familiarize themselves with AFI 36-2909 (in particular paragraph 8 regarding actions in response to unprofessional relationships) and that commanders make certain all personnel are briefed on the policy on an annual basis. To assist commanders and judge advocates in this responsibility, AF/JAG has prepared training materials that can be adapted for each unit's use. These materials include:

- a talking paper
- briefing slides with notes
- frequently asked questions about professional relationships, and
- teaching examples to illustrate the application of the policy.

Experience has shown that most violations of the Air Force policy on Professional Relationships stem from inexperience or unfamiliarity with the policy and can be easily and quickly corrected through education and counseling. Judge advocates play a key role in this education process and together with commanders and supervisors, can help build an environment that fosters teamwork, trust and respect of authority.